

No. 15834 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON and LLOYD CAMPBELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

FILED

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Designation of Record on Appeal (DC).....	63
Adoption of (USCA).....	254
Findings of Fact and Conclusions of Law.....	52
Judgment	57
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	60
Notice of Entry of Judgment.....	59
Statement of Points on Appeal (DC).....	61
Adoption of (USCA).....	254
Transcript of Proceedings and Testimony.....	65

Witnesses for Plaintiff:

Anspach, Paul G.

—direct	68, 88
—cross	99, 115
—redirect	134, 146
—recross	144, 147

Kuka, Frank

—direct	147
—cross	151

Spencer, Charles S.

—direct	159
—cross	165

Stout, Mark W.

—direct	84
---------------	----

Transcript of Proceedings—(Continued):

Witnesses for Defendants:

Aiken, Robert

—direct 226, 232

—cross 227, 243

—redirect 251

Campbell, Lloyd

—direct 214, 229

Henneman, Henry L.

—direct 173, 191

—cross 194

—redirect 197, 225

Kuka, Frank

—direct 198

—cross 203

Parlemee, Clarence

—direct 205

—cross 212

—redirect 214

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In the United States District Court for the District
of Montana, Great Falls Division

No. 1409

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON and LLOYD CAMPBELL,
Defendants.

COMPLAINT

Plaintiff for a first cause of action complains
and alleges:

I.

This Court has jurisdiction of this action by reason of the fact that plaintiff is the United States of America.

II.

The plaintiff, through the Superintendent of the Blackfeet Indian Reservation and acting for and on behalf of Indian persons of the Blackfeet Indian Reservation to whom allotments of land have been made, the title to which lands by the terms of said allotments are held in trust by plaintiff, under date of February 1, 1944, noticed the sale of farming and grazing leases. A copy of said notice of February 1, 1944, is attached hereto marked "Exhibit A" and by this reference incorporated herein.

III.

That in response to the notice of sale of farming and grazing leases hereinbefore referred to the de-

fendant Robert Aiken under date of February 10, 1944, submitted a bid to the Superintendent of the Blackfeet Indian Agency, a copy of which bid is attached hereto marked "Exhibit B" and made a part hereof; said bid was accepted without condition, and, in accordance with the notice of sale of farming and grazing leases and the bid submitted by the defendant Robert Aiken, and the unconditional acceptance thereof, a farming and grazing lease designated and known as F-629 was entered into with the defendant Robert Aiken, a copy of which is hereto attached and marked "Exhibit C" and by this reference incorporated herein. By said instrument it was provided in part:

"All land to be farmed as irrigated farm land on a crop rotation basis * * * If it is shown to be necessary to practice weed eradication for one year out of five, water charges will not be required for that year if water is not used."

IV.

By the terms of the notice of sale of farming and grazing leases to which the defendant Robert Aiken responded by his bid, and which resulted in the farming and grazing lease herein referred to, it is provided in part as follows:

"Where it is necessary to practice weed eradication by summer fallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of five. * * * Dry land farming

is prohibited in this area and the water rental is payable in advance.”

and in the lease the following provision was inserted by typewriter:

“this rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. No lands will be allowed to remain fallow over the winter.”

V.

The defendants L. A. Wollam and Bernard W. Anderson at the time of the execution of the lease entered into with the defendant Robert Aiken executed in writing a bond for a good and valuable consideration whereby they became sureties of said lessee, the defendant Robert Aiken, as more fully appears from “Exhibit C” hereto attached and made a part hereof.

VI.

The lands leased as above described were, as the defendants well knew, designated as a part of the Blackfeet Indian Irrigation Project, and irrigable therefrom through its system of canals and ditches serving the same. By the terms of the said notice of sale of farming and grazing leases, and the bid of defendant Robert Aiken in response thereto and conditioned thereon, and the acceptance thereof by the Superintendent of the Blackfeet Indian Reservation, particularly the words “Dry land farming

is prohibited in this area and the water rental is payable in advance", together with the context, it was understood and agreed between the lessors of said lands and the defendants that the defendant Robert Aiken would pay annually in advance of each irrigation season occurring during the term of said lease, all operation and maintenance assessments which should accrue against said lands pursuant to existing or future orders of the Secretary of the Interior.

In the drafting and writing of said lease (Exhibit C) by the mutual mistake and inadvertence of the parties thereto, the said understanding and agreement on the part of the defendant Robert Aiken to pay said operation and maintenance assessments was omitted therefrom, and in said respect the said contract of lease was at variance with the true agreement and meeting of the minds of the parties; and the plaintiff claims the benefit of sections 17-901 and 17-903 of the Revised Codes of Montana of 1947, and alleges that in justice and equity the said lease should be reformed and revised to express the promise and agreement of the defendant Robert Aiken to pay said assessments as herein alleged.

VII.

During the term of said lease hereinbefore referred to, water charges for the years 1945 to 1948 inclusive were assessed against the leased land in the sum of \$2722.50, which said charges were regularly assessed by the plaintiff and in accordance with the duly promulgated regulations of the De-

partment of the Interior, an agency and department of the plaintiff; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$784.99 accrued to May 31, 1952, have been assessed for non-payment of said sum making a total indebtedness due and owing to plaintiff as of May 31, 1952, the sum of \$3507.49, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

For a Further and Second Cause of Action, Plaintiff Complains and Alleges:

I.

This Court has jurisdiction of this action by reason of the fact that plaintiff is the United States of America.

II.

The defendant Robert Aiken on or about the 14th day of March, 1946, entered into a farming and grazing lease with George Blair, an Indian person enrolled upon the Blackfeet Indian Reservation, for the lease of certain lands described in said lease, and which lands are allotments made to said George Blair; the title to which is in the plaintiff in trust for George Blair. A copy of said lease designated and known as F-761 is attached hereto marked "Exhibit D" and by this reference made a part hereof.

III.

The defendants Lloyd Campbell and Bernard W. Anderson, at the time of the execution of said lease, and for a good and valuable consideration, became sureties for the defendant Robert Aiken; all of which more fully appears in "Exhibit D" hereto attached and made a part hereof.

IV.

By the terms of said farming and grazing lease the said defendant Robert Aiken and his sureties hereinbefore referred to were required to pay operation and maintenance assessments as made. Said lease provides in part as follows:

"It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)."

During the term of said lease there were assessed operation and maintenance charges upon said leased lands by the plaintiff acting through the Department of the Interior, an agency and department of the plaintiff, the sum of \$370.00 for the years 1947 to 1950 inclusive; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, all of whom have failed,

neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$64.74 accrued to May 31, 1952, have been assessed for non-payment of said sum making a total indebtedness due and owing to plaintiff as of May 31, 1952, in the sum of \$434.74, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

Wherefore, plaintiff prays judgment against the defendants as follows:

1. That lease known as F-629, referred to in plaintiff's first cause of action, be revised as alleged and set forth in paragraph V of plaintiff's first cause of action.

2. Against the defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson for the sum of \$3507.49, together with interest and penalties accruing at the rate of $\frac{1}{2}$ of 1% per month from May 31, 1952, on \$2722.50 to the date of entry of judgment herein.

3. Against the defendants Robert Aiken, Bernard W. Anderson and Lloyd Campbell for the sum of \$434.74, together with interest and penalties accruing at the rate of $\frac{1}{2}$ of 1% per month from May 31, 1952, on \$370.00 to the date of entry of judgment herein.

4. For plaintiff's costs and disbursements herein incurred.

5. For such other and further relief as to the Court may seem just and equitable.

DALTON PIERSON,

United States Attorney for the
District of Montana.

/s/ EMMETT C. ANGLAND,

Assistant United States Attorney
for the District of Montana.

(Copy)

EXHIBIT "A"

SALE OF FARMING AND GRAZING LEASES

Blackfeet Indian Agency

Browning, Montana,

February 1, 1944

Sealed bids for farming and grazing leases on Blackfeet Indian land described herein will be received at this office until 2 o'clock p.m. February 21, 1944. A minimum price of \$1.25 per acre, per year, for farm land, and 15 cents for grazing, have been fixed, and bids below that price will not be considered.

The leases for grazing, unless connected with a farm lease, will expire April 30, 1946. Except as noted, farm leases will be for the period ending December 31, 1948. Where an allotment contains both farming and grazing land it is intended that the farming and grazing land be leased to the same person and that the farming period govern the date of expiration, unless otherwise shown. Land in the dry land area must be farmed by the strip method and any new dry land broken must be

stripped the third year and thereafter. Strips are to be 15 rods in width and it is expected that the lessee comply otherwise with the requirements of the AAA.

Where water for irrigation is available, lands generally may be farmed and bids will be considered on a farming basis on sod land, including those listed herein as grazing; provided, of course, the soil is what might be expected to be productive.

In the irrigable area, at least one year of the five must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summerfallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of five. This summerfallow year may be the one allotted to the legume after the same has been plowed under. Where summerfallow is practiced it will be necessary for a cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigable area is to lie fallow during the winter months. Dry land farming is prohibited in this area and the water rental is payable in advance.

Bids are invited on a yearly basis, per acre, with no deduction for stripping or summerfallow. A limited number of crop share bids will be considered, but cash bids are preferred. Where crop shares are desired, the bidder should submit an alternate cash bid. In the case of crop shares, a report must be made within thirty days after harvest showing the amounts and kinds of all crops grown. The lessee

is not to purchase nor grant advances to the lessors on the crops. Crop leases, generally, will provide for delivery of the crop at the market or elevator.

On tracts marked "hay" and other grazing tracts known to produce hay, bids are requested for grazing, and a separate one for the hay. If the owner accepts the hay bid, the rental and hay will be combined in the lease. It is expected that the lessee will not graze the marked hay areas until after the closing of the haying season, but the hay should be taken care of so that grazing may be resumed by September first.

Rentals for the first period of the lease are payable at the time of the approval of the lease. The next cash rental for farm leases falls due on December 1, 1944, and on each following first day of December. Rentals for strictly grazing leases are to be made annually on the first day of May.

Indians who are equipped and financially able to use land upon which they bid, will be first given preference. Otherwise, present lessee who are by their record considered satisfactory, may have the privilege of meeting the high bid on leases that have recently expired or are about to expire.

A satisfactory bond will be required. This may be in the form of two responsible freeholders, a surety company or by depositing in advance the rental for the last year of the lease.

Draft, certified or cashier's check, for at least ten per cent of the yearly rental should accompany the bid. This remittance should be made to the Treasurer of the United States. The remainder of the

first rental payment must be paid at the time of the approval of the lease. A lease fee based on the amount of rental is required. Where the entire rental does not exceed five hundred dollars the fee is not more than five dollars; for each additional five hundred dollars of rental, or fractional part thereof, an additional dollar is required. This fee will be called for when the lease is sent the lessee for signature and is not required with the bid.

The right is reserved to reject any and all bids. Remittances of rejected and low bidders will be returned. But where awards are made and the bidder fails to complete the lease through no fault of the Indian or this office, ten per cent of the amount bid will be forfeited for the use of the Indian owner.

Bids should be addressed to the Superintendent of the Blackfeet Agency, and should be marked on the outside of the envelope: Bid on Farming and Grazing Leases. For further information call upon or write the undersigned.

Sincerely yours,

/s/ F. H. McBRIDE,

F. H. McBride,

Superintendent.

All. No.	Allottee	Description	Sec.	Twp.	Rge.	Use
655	William Gobert	NE/4 NW/4	25	31	6	Farming
3044	Annie Last Star	NW/4 SW/4	25	31	6	20 Farming
2572	Alice Gambler	NW/4 SE/4	25	31	6	Farming
522	Albert Racine	NE/4 SW/4	25	31	6	34 Farming 6 Grazing
2859	Edward G. Doublerunner	NW/4 NE/4	25	31	6	33 Farming 7 Grazing

All. No.	Allottee	Description	Sec.	Twp.	Rge.	Use
2777	Henry Burd	Lot 1	25	31	6	30 Farming (27.02 (Grazing
3045	Florence Last Star	NE/4 SE/4	26	31	6	25 Farming 15 Grazing
2337	George Blair	NE/2 SE/4	30	31	5	Farming
2217	Minnie Foundagun	NE/2	30	31	5	Farming
1937	Margaret Nequette	NE/4 SW/4	30	31	5	Farming
(Description of other allotments omitted as irrelevant.)						

(Copy)

EXHIBIT "B"

Williams, Mont.

Feb. 10, 1944

Superintendent of Blackfeet Agency

Browning, Mont.

Dear Sir;

I would like to place my bid on the following lands;

655	William Gobert	NE/4 NW/4	25	31	6	\$ 50.00	yr.
3044	Annie Last Star	NW/4 SW/4				28.00	"
2572	Alice Gambler	NW/4 SE/4				50.00	"
522	Albert Racine	NE/4 SW/4				43.40	"
2859	Edward G.						
	Doublerunner	NW/4 NE/4				42.30	"
2777	Henry Bird	Lot 1				41.55	"
3045	Florence Last Star	NE/4 SE/4	26	31	6	33.50	"
2337	George Blair	N/2 SE/4	30	31	5	100.00	"
2217	Minnie Foundagun	N/2				400.00	"
1937	Margaret Nequette	NE/4 SW/4				50.00	"
						<hr/>	
						\$838.75	

Enclosed find check for \$85.00 to cover 10% of the bid.

Yours truly,

Robert Aiken.

Note: Cashier's check 26245 Great Falls Nat'l Bank
\$85.00.

EXHIBIT "C"

Department of the Interior
Office of Indian Affairs

FARMING AND GRAZING LEASE

Fee \$12.00.

Cont. X-5-Ind.—9435 Lease No. F-629. Tribe: Blackfeet. Allotment Nos. 655, 3044, 522, 2777, 3045, 2337, 2217, 1937.

This Contract, in quadruplicate, made and entered into this 1st day of January, 1944, by and between the Indian or Indians named below (the Superintendent of the Indian Agency acting for and on behalf of minors, undetermined heirs, noncompetents and nonresidents) hereinafter called the "lessor".

Lessors: (see attached schedule)
and Robert Aiken of Williams, State of Montana, Rural Route No. hereinafter called the "lessee", under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements hereinafter provided for, the lessor doth hereby let and lease unto the lessee the land and premises described as follows, to wit: (See schedule) of Sec., Twp. R. West, containing 697.02 acres, more or less for the term of five years, beginning on the first day of January, 1944, fully to be completed and ended on

the 31st day of December, 1948, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay the officer in charge of the Indian agency \$788.75 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below.

Date due: Upon approval of lease \$788.75; December 1, 1944, \$788.75; December 1, 1945, \$788.75; December 1, 1946, \$788.75; December 1, 1947, \$788.75.

All land to be farmed as irrigated farm land on a crop rotation basis. This rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. No lands will be allowed to remain fallow over the winter. If it is shown to be necessary to practice weed eradication for one year only out of 5, water charges will not be required for that year if water is not used.

1. Interest. It is understood and agreed by and between the parties hereto that if any installment of rental is not paid within thirty days after becoming due that interest at the rate of . . . per cent per annum will become due and payable from date rental became due and will run until said rental is paid.

2. Improvements to Be Placed.—It is expressly understood and agreed by and between the parties hereto that the lessee will at his own expense, within . . . from the beginning of

this lease build, construct, and * * * all of which are to be constructed in a substantial and workmanlike manner and of durable material within the time limit specified above, or he shall be liable for the full value thereof, with a fifteen per cent penalty additional for improvements not made as above set forth.

3. Improvements Which May Be Removed.—It is further agreed by and between the parties hereto that the lessee may place the following improvements on the land covered by this lease and remove same within thirty days after the termination of his occupancy; Provided, that he may not attach such improvements to any improvements already on the land or to permanent improvements to be hereafter constructed, in such a way that the removal thereof would in any way damage the improvements which must be left on the land.

4. Improvements Which May Not Be Removed.—It is further understood and agreed by and between the parties hereto that any and all improvements placed upon the leased premises not stipulated in this lease contract are to remain thereon at the expiration of the lease term and become the property of the lessor.

5. Insurance. — It is further understood and agreed by and between the parties hereto that the lessee is.....to insure buildings now on the leased premises or hereafter placed thereon, which are in physical condition to insure, against loss by fire, lightning, windstorm and tornadoes in the full insurance value thereof, for the use and benefit of

the lessor, in a company acceptable to the officer in charge of the Agency, and will keep such insurance in force during the full term of this lease; the insurance money, in the event of loss, to be paid to the said officer in charge, for the use and benefit of the lessor; provided, however, that the lessee may rebuild the improvements within ninety days after the loss to the satisfaction and acceptance of said officer in charge, and in such case receive the insurance money in reimbursement of the expense incurred. The option of the lessee so to rebuild must be declared to said officer in charge within thirty days after the date of the loss; in the event that the lessee does not exercise the option hereunder, it is agreed that said improvements may be rebuilt therewith in the discretion of the said officer in charge. In event the buildings are in physical condition to insure but on account of their not being occupied no insurance company will write a policy, it is understood and agreed by and between the parties hereto that the lessee is to be responsible to the said officer in charge for the full value thereof, and that in event of loss he will pay to the said officer in charge the full amount of the damages, for the use and benefit of the lessor; provided, that said lessee may rebuild or repair the destroyed or damaged buildings under the same conditions as hereinbefore provided for destroyed or damaged buildings which had been insured. It is further understood and agreed by and between the parties hereto that the lessee must within fifteen days after the beginning of this lease file with the officer in

charge of the Agency a proper insurance policy or a statement by some reputable insurance agent that the buildings are not in physical condition to insure; and it is further understood and agreed by and between the parties hereto that the failure of the lessee to file said policy or statement will forever bar him from claiming that the buildings are not in physical condition to insure and will render him liable to the said officer in charge, for the use and benefit of the lessor, for the full amount of any loss, of or to said buildings. It is further understood by and between the parties hereto that in the event of the loss or damage of any buildings which have not been insured and for which the lessee has not filed the above indicated statement that said buildings were not in physical condition to insure, that the officer in charge of the Indian Agency is to appraise the amount of the loss and his appraisal is to be accepted as the true amount of the damage which the lessee is to pay. Where the word "not" is inserted in the first line of this paragraph this clause does not apply.

6. Repairs.—It is understood and agreed by and between the parties hereto that the lessee is to keep the premises covered by this lease in good repair, and the said lessee will be responsible for all damages done to buildings and fences and other improvements, except the usual wear and decay.

7. Manner of Cultivation, Noxious Weeds, Johnson Grass, Etc.—It is understood and agreed by and between the parties hereto that the lessee is to cultivate, improve, and farm the lands covered by

this lease in a husbandlike manner to the best advantage; that he is to commit no waste thereon; that he is to keep said lands free from noxious weeds; and that he is to keep down all Johnson grass that may appear on the leased premises during the term of this lease and to use diligence in an effort to destroy same.

8. Crop Leases.—It is understood and agreed by and between the parties hereto that the lessee will not purchase or be a party to the purchase by anyone, of the lessor's share of the crop, prior to its delivery as hereinbefore provided, and that should he purchase the crops after that time, he will pay the regular commercial price in effect on date of such purchase; that the lessor will not mortgage or otherwise encumber or dispose of his share of the crop prior to its delivery by the lessee as hereinbefore provided for; and that the lessee will harvest crops as soon as possible after maturity in order that the lessor may pasture the land or sow it to wheat. It is further understood and agreed by and between the parties hereto that a strictly crop lease gives the lessee no rights whatsoever in or to any land not cultivated; in or to any pasture on the land; building on the premises; unless specifically stated.

It is further agreed and understood that the shares in a crop rental shall be as follows: One-fourth of cotton, when hand picked, one-third for snapped picked cotton, and two-fifths for sledded cotton, for the lessor's share. All cotton to be delivered at the gin, and money representing the les-

sor's part to be paid to the disbursing officer. If the lessor, or lessors, fail to receive the lessor's part of grain at the threshing machine, the lessee may market such grain and have a fair allowance for hauling such grain from the machine to market, all weights and bills to be presented to the farmer or agency office for final settlement. This division of crops and the handling of same shall govern unless otherwise specified in paragraph No. 2.

9. Stalk Fields.—It is understood and agreed by and between the parties hereto that stalk fields upon the leased premises shall not be sold unless the same will be consumed without injury to the land and prior to the expiration of this lease; and that no cattle or other stock are to be placed upon the stalk fields in wet weather and that the lessee and his sureties shall be liable to the United States, for the use and benefit of the lessor, for any and all damages resulting to the land in violation of this provision of the lease contract. (This paragraph does not apply to ordinary crop leases as, under paragraph 7 above, the lessee has no rights to such stalk fields.)

10. Overpasturing—Stock Laws—Fertilizers. — It is understood and agreed by and between the parties hereto that the lessee will not pasture on the leased premises an unreasonable number of animals for the grass and pasture afforded; that he will observe all quarantine and other stock laws and regulations now in force or hereafter promulgated by the United States or the State authorities; and that all manure and other fertilizer which may be

produced upon the leased premises shall be the property of the lessor and shall be distributed upon the leased lands.

10A. Terracing.—It is understood and agreed by and between the parties hereto that the lessee will terrace and keep up the terrace on.....acres of land covered by this lease at an estimated cost of \$.....; and it is further understood and agreed that the lessee shall do the terracing in accordance with the methods used by the State Agricultural College of the State in which the land covered by this lease is located. In Oklahoma Revised Circular No. 218, Series 56, 1928, the subsequent instructions issued by the Cooperative Extension Work in the Oklahoma Agricultural and Mechanical College, located at Stillwater, Okla., shall be followed.

11. Subleasing—Illegal Assignments—Transfers.—It is understood and agreed by and between the parties hereto that any sublease, assignment, or transfer of this lease or of any interest therein can lawfully be made only with the consent of the lessor in writing and the approval of the representative of the U. S. Government by whom this lease is approved, or his successor in office, and that any assignment, sublease, or transfer made or attempted without such consent and approval shall be void and render this contract subject to cancellation by such officer. It is further understood and agreed by and between the parties hereto that the lessee hereto will be guilty of unlawful subleasing if he contracts, without the consent of the lessor, and

the approval of the officer in charge of the Indian agency, in writing, with any other person or persons to farm or use the premises, or any part thereof, on any other basis than the payment by said lessee of so much money per hour, per day, per week, per month, or per job. It is further understood and agreed by and between the parties hereto that all share cropping or releasing for cash, all or any part of the premises, by the lessee herein, without the consent in writing of the lessor and the written approval of the officer in charge of the Indian agency, except as provided in paragraph numbered 8, hereinbefore, is unlawful subleasing and renders this lease subject to cancellation by said officer in charge of the Indian agency.

12. Timber.—It is understood and agreed by and between the parties hereto that the lessee herein may utilize as fire wood, for his own use only, such dead and down timber as there may be on the leased premises which is not required by the lessor for his own, individual use; that no green timber may be cut by either the lessor or lessee without written consent of the officer in charge of the Indian agency, except that the lessee may cut posts for repairing fences on the leased premises only. (See paragraph 13 prohibiting the lessee cutting posts where a cash allowance is made in the lease contract.)

13. Posts.—Where a cash consideration is allowed for posts, it is understood and agreed by and between the parties hereto that metal, yellow pine, bois d'arc, post oak, or white oak posts are

to be furnished unless otherwise stipulated in paragraph No. 2. The kind of posts to be furnished is to be stated in the blank space in paragraph No. 2 and if it be either of the five kinds named in this paragraph, the specifications are to be as follows: Metal posts must be steel line posts, 6 feet in height, weight not less than $8\frac{1}{2}$ pounds finished with a heavy coat of special steel paint, to be set in the ground two feet and no more than 20 feet apart, corner and gate posts well braced, must be not less than $7\frac{1}{2}$ feet in length, weight not less than 20 pounds, gauge No. 8, and must be set in the ground $3\frac{1}{2}$ feet. Bois d'arc No. 1 select, white oak No. 1 select, post oak No. 1 select or Southern Yellow pine to be 6 to $6\frac{1}{2}$ feet in length and 4 to 5 inches in diameter at the top, placed not less than 2 feet in the ground, set in a true line, well tamped, not farther than 20 feet apart, corner and gate posts are to be 8 feet in length, not less than 8 inches in diameter at the top, placed $3\frac{1}{2}$ feet in the ground, fence to be well braced at the corners and gates. The Southern Yellow pine posts must be pressure treated with No. 1 grade English creosote oil. (Where a money consideration is allowed, and where other than either of the five kinds of posts named in this paragraph are agreed upon, such posts must be stipulated in writing in paragraph No. 2 with special specifications required to fulfill the contract.)

14. Nuts and Fruits. — It is understood and agreed by and between the parties hereto that the lessor reserves all uncultivated nuts such as pecans,

walnuts, etc., berries and other wild fruits, except a reasonable amount for the personal use of the lessee and his immediate family unless otherwise provided in the lease.

15. *Prairie Dogs.*—It is understood and agreed by and between the parties hereto that the lessee herein must kill all prairie dogs on the leased premises within six months after the beginning of this lease and must thereafter, during the term of this lease, keep the premises free from prairie dogs. It is further agreed by and between the parties hereto that failure on the part of said lessee to comply with requirement relative to killing prairie dogs shall render this lease subject to cancellation and the lessee hereto liable for liquidated damages in the amount of \$50, in the option of the officer in charge of the Indian agency.

16. *Business Leases.*—It is understood and agreed by and between the parties hereto that the lessor reserves the right to make a business lease on the premises covered by this lease and that in event such a lease is made, the lessee hereunder shall be entitled to actual damages sustained by him on account of said business lease, and to nothing more. It is further understood that in the event a dispute between the lessee hereunder and the lessee under the business lease as to the amount of such actual damages the matter will be referred to the officer in charge of the Indian agency, who shall be the sole and final judge as to the amount of the said damages.

17. *Introduction and Manufacture of Intoxicants*

—Unlawful Conduct.—It is understood and agreed by and between the parties hereto that the lessee will not use or permit the premises covered by this lease to be used for any unlawful conduct or purpose whatsoever; that he will not use or permit the use of the leased premises, or any part thereof, for the manufacture, sale, gift, or storage of any intoxicating liquors or beverages and that he will not permit the introduction of same into or upon the leased premises; and, that any violation of this provision by the lessee, or with his knowledge, shall render this lease subject to cancellation by the officer in charge of the Indian reservation.

18. Delinquencies.—It is understood and agreed by and between the parties hereto that if the lessee hereto shall fail to pay the rents when due, or to construct or place the improvements on said land as contracted for and in the manner herein provided, or shall fail to comply with or shall violate any of the provisions of this contract, the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises, and eject the lessee therefrom, and this lease shall thereupon be subject to cancellation by the officer in charge of the Indian reservation, but such forfeiture shall not release the lessee from paying all rents contracted for or from damages for such failure or violation; and it is further understood and agreed that there shall be a lien upon all crops grown or raised upon the leased premises as a security for

the payment of the rents and the making of the improvements provided for herein.

19. *Delivery of Premises.*—It is understood and agreed by and between the parties hereto that at the expiration of the time mentioned in this lease the lessee shall peaceably and without legal process, deliver up the possession of the premises herein described in as good condition as they now are, usual wear and unavoidable accidents excepted.

20. *Upon Whom Binding.*—It is understood and agreed by and between the parties hereto that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties to this lease.

21. *Must Be Approved.*—It is understood and agreed by and between the parties hereto that this lease shall be valid and binding only after approval by the officer in charge of the.....
Indian Agency.

22. *Surrender Clause Permitting Seeding Fall Small Grain.*—It is understood and agreed that the lessee will surrender, without cost, the stubble land and other land in suitable condition on which he has no growing crop, to be seeded to fall grain or alfalfa five months prior to the expiration of the lease, when the lease expires at the close of the calendar year; or, prior to the expiration of the year when the lease expires on or before April 1st of the following calendar year.

23. *Interest of Member of Congress.*—No Member of, or Delegate to Congress, or Resident Com-

missioner shall be admitted to any share or part of this contract, or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof, the lessee hereunto has affixed his hand and seal and the lessor hereunto has caused to be attached his legal acceptance on which he has affixed his hand and seal, the day and year first above written.

/s/ ROBERT AIKEN,
Robert Aiken,
Lessee.

Two witnesses to each signature: L. A. Wollam,
P. O. Williams, Mont. Robert Burgess, P. O.
Valier, Mont.

State of Montana, County of Pondera—ss.

I, Robert Aiken, lessee herein, being first duly sworn, depose and say that I am leasing the lands herein described for my own use and benefit, and not, either directly or indirectly, for the use or benefit of any other person or corporation; that I have no agreement, arrangement, or understanding with any person, persons, or corporation whereby said lands or any part thereof shall or may be used, enjoyed or occupied by or for the benefit of any person, persons, or corporation other than myself; and that I have not paid and will not pay any monetary, or other consideration, directly or indirectly, to the lessor for the use of the property

herein described, except as specifically provided for by the terms hereof.

I hereby acknowledge the signing and sealing of this lease to be my free act and deed. .

/s/ ROBERT AIKEN.

Subscribed and sworn to before me at Valier, Mont., this 27th day of May, 1946.

[Seal] /s/ HARRY KING,
Notary Public. My commission expires May 6, 1948.

Bond

In consideration of the letting of the premises described in the foregoing indenture of lease, and of the sum of \$1 to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, Lloyd Campbell, of Rural Route No. 1, Pondera County, and Bernard W. Anderson, of Rural Route No. 1, Pondera County, hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by Robert Aiken, the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 percent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be liable for material

furnished under the contract provided such material is of the kind and quality called for under this contract. And we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed this 27th day of May, 1946.

[Seal] /s/ LLOYD CAMPBELL.

[Seal] /s/ BERNARD W. ANDERSON.

Witnesses:

 /s/ A. O. HAMMER.

 /s/ HARRY KING.

Verification of Sureties

State of Montana, County of Pondera—ss.

Lloyd Campbell and Bernard W. Anderson, the sureties to the foregoing indenture of lease, being duly sworn and severally examined by me, state that they signed the foregoing obligations as the sureties for the lessee under the annexed lease, and that they and each of them, respectively, own and possess property over and above all debts, liabilities, and legal exemptions of the value and worth the sum placed opposite their names.

 /s/ LLOYD CAMPBELL,

 /s/ BERNARD W. ANDERSON.

Subscribed and sworn to before me, at Valier, Mont., this 27th day of May, 1946.

[Seal] /s/ HARRY KING,

Notary Public. My commission expires May 6th, 1948.

Recommended for approval.

/s/ [Illegible.]

Agric. Exten. Agent.

Department of the Interior, United States Indian
Service, July 11, 1946.

The within lease is hereby approved and declared
to be made in accordance with the law and the
rules and regulations prescribed by the Secretary
of the Interior thereunder, and now in force.

/s/ F. H. McBRIDE,

F. H. McBride,

United States Indian Superin-
tendent.

EXHIBIT "D"

Department of the Interior
Office of Indian Affairs

Lease No. F-761
Blackfeet Indian Agency Contract No.....

FARMING AND GRAZING LEASE

Tribe: Blackfeet

Allotment No. 2337

This Contract, in quadruplicate, made and en-
tered into this 14th day of March, 1946, by and
between the Indian or Indians named below (the
Superintendent of the Indian Agency acting for
and on behalf of Indians non compos mentis,
minors, undetermined heirs, and nonresidents whose
whereabouts are unknown), hereinafter called the
"lessor,"

B-105—George Blair, 80 Acres farming at \$1.25 per acre per yr.—\$127.84; 185.60 Acres grazing at 15c per acre per yr.; Total, \$127.84; and Robert Aiken of Valier, State of Montana, Rural Route No....., hereinafter called the “lessee,” under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing Leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements herein after provided for, the lessor doth hereby let and lease unto the lessee the land and premises described as follows, to wit: Lots 7, 8, N/2 SW/4, SW/4 SW/4 Sec. 29; S/2 SE/4 of Sec. 30, Twp. 31, R. 5 West, containing 265.60 acres, more or less, of which not to exceed 80 acres may be cultivated, for the term of 41½ years, beginning on the first day of May, 1946, fully to be completed and ended on the 31st day of December, 1950, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay to the officer in charge of the Indian Agency \$127.84 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below. If this lease covers land within an irrigation project, the lessee is also obligated to pay in addition to the rental the irrigation charges as provided for in section 6, in accordance with the leasing regulations (Title 25—Indians, CFR, Part 171, as amended).

Date Due: On approval \$127.84; Dec. 1, 1946,

\$127.84; Dec. 1, 1947, \$127.84; Dec. 1, 1948, \$127.84; Dec. 1, 1949, \$127.84.

All land to be farmed as irrigated farm land on a crop rotation basis. This land must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. All farm lands to be farmed in a husbandlike manner on a crop rotation basis, with at least one leguminous crop on all five-year leases. No land to remain fallow over the winter. Irrigation water assessment to be paid at same time rental is paid.

Amount of Bond \$. Lease Fee: \$6.00.

[Paragraphs Nos. 1, 2, 3, 4, 5 are practically the same as in Lease F-629 set out at pages 16-19 except in 1.—Interest—no amount is inserted.]

6. Operation and Maintenance.—It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25—Indians, CFR, part 130).

7. Repairs and Maintenance.—It is understood and agreed that the lessee is to keep the premises covered by this lease in good repair, and the said lessee will be responsible for all damages done to buildings and fences and other improvements, ex-

cept the usual wear and decay, to clean out old ditches and construct such new ditches and laterals as may be necessary for the economical use of water appurtenant to the land, and keep such ditches and laterals free from willows, shrubbery, and wild grasses; to repair and keep in order all head gates, checks, drops, culverts, dams, flumes, and other structures necessary and maintained for the conveyance and control of water; to make beneficial use of all water appurtenant to said land, and to guard against excessive use of water or the swamping of said land through leakage or seepage, as provided by irrigation regulations (Title 25—Indians, CFR, Subchapter L).

[Paragraphs 8 through 24 are practically the same as paragraphs 7 through 23 of Lease F-629 as set out at pages 19-28.]

/s/ ROBERT AIKEN,

Robert Aiken,

Lessee.

/s/ GEORGE BLAIR,

George Blair,

Lessor.

Two witnesses to each signature: Harry King, Valier, Mont.; A. O. Hammer, Valier, Mont.; Rose Farrell, 315 So. K St., Tacoma, Wn.; W. M. Roberts, 614½ So. 18th St., Tacoma, Wash.

State of Montana, County of Pondera—ss.

I, Robert Aiken, lessee herein, being first duly sworn, depose and say that I am leasing the lands herein described for my own use and benefit, and

not, either directly or indirectly, for the use or benefit of any other person or corporation; that I have no agreement, arrangement, or understanding with any person, persons, or corporation whereby the said lands or any part thereof shall or may be used, enjoyed or occupied by or for the benefit of any person, persons, or corporation other than myself; and that I have only.....acres (andacres) of land leased from Indians for farming purposes, including the land herein described. (The filling in of the number of acres is very material and must hereafter be done in every case. In event there is only one lessee he should fill in the blank space for number of acres which is not in parenthesis. In event there are two lessees the first named herein should fill in the first blank space and the second should fill in the blank space in parenthesis. In event there are two lessees to this lease only one-half the acreage covered by this lease should be added to the acreage already leased by each lessee.)

I hereby acknowledge the signing and sealing of this lease to be my free act and deed.

/s/ ROBERT AIKEN.

Subscribed and sworn to before me, at Valier, Mont., this 19th day of June, 1944.

[Seal] /s/ ROBERT BURGESS,
Notary Public. My commission expires October 26,
1945.

Bond

In consideration of the letting of the premises described in the foregoing indenture of lease, and

of the sum of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, L. A. Wollam of Williams, Pondera County, Mont., and Bernard W. Anderson of Williams, Pondera County, Mont., hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by Robert Aiken, the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 per cent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be liable for material furnished under the contract provided such material is of the kind and quality called for under this contract. And we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

[Seal] /s/ L. A. WOLLAM.

[Seal] /s/ BERNARD W. ANDERSON.

Witnesses: E. H. Windle, Robert Burgess.

Verification of Sureties

State of Montana, County of Pondera—ss.

L. A. Wollam and Bernard W. Anderson, the

sureties to the foregoing indenture of lease, being duly sworn and severally examined by me, state that they signed the foregoing obligations as the sureties for the lessee under the annexed lease, and that they and each of them, respectively, own and possess property over and above all debts, liabilities, and legal exemptions of the value and worth the sum placed opposite their names.

/s/ L. A. WOLLAM \$800

/s/ BERNARD W. ANDERSON \$. . . .

Subscribed and sworn to before me, at Valier, Mont., this 19th day of June, 1944.

[Seal] /s/ ROBERT BURGESS,
Notary Public. My commission expires October 26,
1944.

Recommended for approval:

/s/ A. M. LONGENBAUGH,
Agric. Exten. Agent.

Department of the Interior, United States Indian
Service, June 22, 1944.

The within lease is hereby approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force.

/s/ F. H. McBRIDE,
United States Indian Superin-
tendent.

[Endorsed]: Filed August 27, 1952.

[Title of District Court and Cause.]

ANSWER

Come now, the defendants and for their answer to plaintiff's complaint on file herein and to plaintiff's first cause of action deny each and every allegation, matter and thing therein contained except as the same may be herein admitted or qualified.

I.

Admit the allegations of paragraphs I, II, and III.

II.

As to the allegations of paragraph IV, admit that the defendant, Robert Aiken, submitted his bid for the lands in question under the terms of the notice of sale of farming and grazing leases which resulted in the farming and grazing lease referred to. Denies that the rotation of crops as set forth in said lease would include at least one leguminous crop for one season over all the lease, but alleges that the intent of the parties to the said lease was that the said land would be strip-farmed. Defendant further alleges that the land in question was not second class irrigated land but was dry land and which said land could not be farmed by irrigation.

III.

As to the allegations of paragraph V, admits that defendants L. A. Wollam and Bernard A. Anderson at the time of the execution of the lease by the defendant Robert Aiken executed in writing a bond

whereby they became sureties of said lessee, Robert Aiken. But defendants allege that by the terms of said bond no reference was made to operation and maintenance charges and it was intended that such bond would only cover the rentals called for in said lease and therefore said bondsmen are released and discharged from any and all liability under said bond.

IV.

As to the allegations of paragraph VI, denies that the defendants knew that the leased lands in question were designated as a part of the Blackfeet Indian Irrigation Project but alleges that the said lands were always called "Badger-Fisher Irrigation Project" or "District". Denies that the said leased lands were irrigable from the said Blackfeet Indian Irrigation Project through its system of canals and ditches serving the same and alleges that the said leased lands were not capable of irrigation from the system of canals and ditches on the said project and in fact the greater part of said leased lands were not served by adequate or any system of canals and ditches and it would have been impossible due to the location and character of said leased lands to irrigate same.

Defendants further deny that the terms of said notice of sale of farming and grazing leases contained any provisions or terms relating to the fact that dry land farming was prohibited in said area and the defendants further deny any understanding or agreement between the lessors of said lands and the defendants that the defendant Robert Aiken

would pay any water rental in advance of each irrigation season. Defendant Robert Aiken alleges in this respect that if the said water rental was payable in advance that the plaintiff waived this provision and such is unenforceable because of the tolling of the Statute of Limitations and at no time during the term of said lease or until this suit was filed was a demand made on defendants for the payment of any water rental. Defendants further allege that if said land was irrigable that plaintiff would allot said land in forty acre tracts and conversely if said land was not irrigable it would be allotted in 160 or 320 acre tracts. That under the terms of said lease the land was allotted in contiguous tracts containing considerably more acreage than forty acres.

Defendants deny that there was mutual mistake and inadvertence of the parties to said lease in omitting to provide that the defendant Robert Aiken would pay operation and maintenance assessments. That it was not the intent of the parties to include operation and maintenance assessments in said lease as the said land was not capable of being irrigated and in fact the greater portion of said land contained no irrigation ditches or canals. That at the time defendant Robert Aiken entered into said lease he was informed that the said land had been stripped for five years previously and the previous lease on said land provided it was to be farmed as dry land as well as the subsequent lease to defendant Robert Aiken's lease, and it was therefore not the intent of the parties to irrigate said land.

V.

As to the allegations of paragraph VII defendant denies that the sum of \$3,507.49 or any sum whatsoever is due and owing plaintiff and denies that water charges were ever assessed by plaintiff against him and alleges that no demand for payment of any said sum was ever made upon defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson and that all sums due from defendant Robert Aiken to plaintiff have been paid in full and said lease has been fully performed by said defendant Robert Aiken.

Come now, the defendants and for their answer to plaintiff's second cause of action deny each and every allegation, matter and thing therein contained except as the same may be herein admitted or qualified.

I.

Admit the allegations of paragraph I, II and III.

II.

As to the allegations of paragraph IV defendants Lloyd Campbell and Bernard W. Anderson deny that they as sureties were required to pay operation and maintenance assessments or any part thereof and allege in this respect that by the terms of the lease the lessee would pay all operation and maintenance assessments. Defendants further allege that if any operation and maintenance assessments were payable in advance on the due date preceding each irrigation season that plaintiff failed and refused to make any demand whatsoever upon defendants

for the payment of such assessments and made no demand for any such payments until said action was filed. That pursuant to and under the laws of the State of Montana, Section 93-2603, (RCM 1947) it provides that the Statute of Limitations for recovery of rents and profits under a lease shall be the period of eight years. That said action has not been commenced within said period and therefore is barred by the Statute of Limitations. That the United States Code Annotated, Title 25 (Indians) Section 347 provides in part that the Statute of Limitations of the State in which said land is situate shall apply and be a complete defense to such action.

Defendants further deny that the sum of \$434.74 or any sum whatsoever is due, owing and unpaid to said plaintiff.

By Way of Further Answer and for Their First Affirmative Defense Defendants Allege as Follows:

I.

That the defendant Robert Aiken entered into a farming and grazing lease with the United States Government to lease certain Indian lands, titles to which lands are held in trust by plaintiff and which said lease is dated January 1, 1944 and numbered F-629. That by the terms of said lease it stated that such land was to be farmed as irrigated farm land on a crop rotation basis. That it was not the intent of the parties thereto that such land be farmed as irrigated farm land nor that operation and maintenance charges be assessed against defendants and

therefore no mention or provision was inserted therein in respect to operation and maintenance charges.

II.

That if any operation and maintenance charges were due the same would have accrued prior to the date of August 27, 1952 which date said plaintiff filed suit against said defendants. That any such charges or assessments which had accrued were payable in advance on the due date preceding each irrigation season. That no due date was mentioned in said lease. That if any irrigation and maintenance charges became due, the first installment of which would become due prior to the 1944 irrigation season, which was the first year of said lease.

III.

The defendants have not paid any said assessments during the year 1944 or preceding the said irrigation season during 1944, nor have the said defendants paid or agreed to pay any such assessments to date.

IV.

That Title 25 (Indians) of the United States Code Annotated, Section 347 provides in effect as follows:

“In all actions brought in any state court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee for the possession of rents or profits

on lands patented in severalty to the members of any tribe of Indians * * * the Statutes of Limitations of the states in which said land is situate shall be held to apply and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the Statutes of said states the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians”.

That the said land in question had been allotted and patented to the Indian persons of the Black-foot Indian Reservation. That said patents were held in trust for the allottees by the United States Government.

Under and by virtue of the aforesaid quoted portions from the United States Code Annotated, the Statutes of Limitations for the State of Montana apply to said action. Section 93-2603, Revised Codes of Montana, 1947, provides that the Statutes of Limitations shall be eight years upon

“an action upon any contract, obligation or liability founded upon an instrument in writing”.

That the said period of limitation of eight years has expired from the due date of the first installment of any operation and maintenance charges which may have been assessed or become due under and by virtue of said lease. That plaintiff is therefore barred under and by virtue of said statutes from bringing any action against said defendants.

For Further Answer and by Way of Second Affirmative Defense Defendants Allege as Follows:

I.

That on or about the first day of January 1944 and the 14th day of March, 1946, the defendant Robert Aiken entered into certain farming and grazing leases with the Blackfeet Indian Tribe through the United States Department of the Interior and which said leases were designated as F-629 and F-761 respectively. That said lease F-629 provides among other things for an annual rental in the amount of \$788.75 and said lease number F-761 provides among other things for an annual rental of \$127.84.

II.

That said defendant Robert Aiken entered into possession of said leased lands under and by virtue of said leases and farmed said lands on a dry land basis. That said lands were not capable of or suited to irrigation. That in fact the majority of said lands did not have any irrigation facilities whatsoever and it would have been impossible for said defendant Robert Aiken to irrigate said lands if it were necessary.

III.

That said defendant Robert Aiken has paid in full the annual rentals provided for in said leases and has fully and completely performed all the terms and conditions thereof.

Wherefore, having fully answered the allegations

of plaintiff's complaint herein the defendants pray that the action may be dismissed and that they go hence with their costs.

/s/ C. W. MURCH,
/s/ J. J. WUERTHNER,
/s/ JOHN P. WUERTHNER,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: November 7, 1952.

[Title of District Court and Cause.]

DECISION

This is a civil action brought by the plaintiff to recover an alleged indebtedness due the United States under Contracts of Lease of Indian lands, entered into by plaintiff with defendant Aiken, with the other defendants as sureties, wherein the former was required to pay a specified annual rental, and also other charges, comprising the main issue herein.

The lands leased by the defendant were situated within the Blackfeet Indian Reservation, in the State of Montana, and within the Blackfeet Indian Irrigation project. There are two leases of land within the said irrigation project, in question here, the title to which is in the United States in trust for the Indian allottees.

A basic regulation of which the defendant was charged with knowledge, is referred to as 25 C F R 171.26, promulgated by the Secretary of the Inte-

rior, May 2, 1942, and published 7 F. R. 3958, reading as follows: "171.26, Leases or Permits, irrigable lands. Leases and Permits of restricted allotted or tribal Indian lands within an irrigation project shall require the lessee, or permittee, to pay on the due date annually in advance during the term of the instrument, and in amounts determined by orders of the Secretary of the Interior, the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease or permit, and the irrigation charge shall be in addition to the rental payments prescribed in the lease or permit. All payments of such irrigation charges and penalties shall be made to the Superintendent or other designated officer". This regulation was in force in 1944 when the first lease was made, and in substance is still in effect as 25 C F R 171.12.

The form of lease for leasing of Indian lands used in the 1946 lease, contained the following language: "6. Operation and Maintenance: It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties accruing against the above described land under irrigation, pursuant to existing or future orders of the Secretary of the Interior (Title 25 Indians, C F R, part 130)."

Plaintiff contends, against the denial of defendant, that the 1944 lease does provide for payment of the irrigation charges as disclosed by the terms of the lease itself, read in connection with advertisement for bids and defendant's acceptance

thereof. Notwithstanding the omission of the above quoted paragraph. Wording of the lease shows that it is made: "Under and in accordance with the provisions of existing law, and the regulations prescribed by the Secretary of the Interior relative to farming and grazing leases on restricted Indian lands".

The advertisement (Exhibit A) is entitled "Sale of Farming and Grazing leases, Blackfeet Indian Agency, Browning, Montana, February 1, 1944". It called for sealed bids for farming and grazing leases on Blackfeet Indian land "described herein". There was a fixed minimum price of \$1.25 per acre, per year, for farm land, and Fifteen Cents for grazing. Sealed bids were sought for farming and grazing leases on Blackfeet Indian land in both the "dry land area" and the "irrigable area". In the irrigable area, which would include lands under the irrigation project, at least one year in five must be allotted to the use of a legume such as alfalfa or sweet clover. Where necessary to practice weed eradication by summer fallow, the lessee may do so and there will be no charge for water. But this waiver of water charge may be for one year only out of five. Where summer fallow is practiced it will be necessary for a cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigable area is to lie fallow during the winter months. Dry land farming is prohibited in this area, and the water rental is payable in advance.

The advertisement seems to make it plain to the

bidder for a lease of Indian lands, what he may expect when he leases land in the dry land area of the Reservation, and what liability he will incur if he leases land in the irrigable area. He leased land in the irrigable area under the Blackfeet Irrigation Project.

The Court has read over carefully both the leases in question in this case, and the language therein contained in connection with defendant's written application for leases under this project, in answer to advertisement for bids, seems to present a valid contract between the parties.

The case cited by plaintiff of *McDonald v. McNinch* (Mont.) 206, p. 1096, seems to bear some resemblance to the situation presented in the present case. It is clearly expressed that defendant under both leases was required to farm the lands as irrigated lands on a crop rotation basis; in other words, that an irrigated farm operation was required of defendant.

In the advertisement for bids heretofore referred to, which was accepted by defendant, the fourth paragraph therein is particularly applicable.

"In the irrigable area * * * dry land farming is prohibited in this area, and the water rental is payable in advance."

As set forth in the brief: "Under date of February 10, 1944, as shown by Exhibit B of the Complaint, Aiken submitted the bid by which he unconditionally accepted all the stipulations and conditions of the advertisement, necessarily including the provision just quoted. This bid was unconditionally

accepted by the Superintendent and the lessors. Execution of the formal lease of 1944 was the result of this offer and acceptance, and was obviously intended to formulate the conditions thus agreed upon. All these documents were contemporaneous, and the Montana Supreme Court has many times held that the entirety must be construed together. Citing *Lyon v. Daily Copper Co.*, 126 P. Mont. 931, and five other Montana authorities and also citing *Doheny v. U. S. F. & G. Co.*, 34 F. Supp. 888 (Mont.), holding that all instruments involved in a transaction, done at the same time, concerning the same subject matter, are to be read together as one instrument, which case was affirmed in 123 F. (2) 746. The Superintendent of the Reservation was required to comply with the provisions of C F R 171.26, and not execute a lease which did not require the payment of operation and maintenance charges under the irrigation project. (Blackfeet Irrigation Project, Title C F R, Sec. 91.1 et seq.)

There seems to be no question that this irrigation project contained a system of canals and irrigation ditches for the use of lessees under the project, and for the use of this defendant under his leases, and while there is conflict in the testimony as to the feasibility of irrigating some of this leased land, as it appears to the Court from the evidence, irrigation facilities were available to lessee.

The defendant entered into the first lease in 1944, and the second lease in 1946, knowing about the character of the soil, the nature and extent of the irrigation system, and the existing conditions, and

the regulations governing the use of lands under the project, and knowing that dry land farming was prohibited, and also knowing that operation and maintenance charges were required to be paid by leaseholders under the irrigation project; the fact that he did not pay these charges in advance as required may have been due to neglect of the officer, whose duty it was to collect such charges when they became due.

Counsel for defendant has presented an able argument in behalf of his client, and if it should ultimately appear that this Court is in error, relief will readily be obtainable. It seems to be the main contention that the irrigation project consisted of a "dry land area" and an "irrigable area", without reference to the Reservation at large, and that in the area occupied by defendant, he was not required to pay a water rental charge, and that he could carry on dry land farming operations at will, but this does not seem to be the reasonable or proper construction of the statutes, regulations and documentary evidence presented in the case, and the testimony given does not change the situation. However, it does seem to the Court that a serious oversight or neglect has taken place for which the Government agents were responsible, and which might lead the defendant to believe that no water charges would be made, after so many years had elapsed before a demand for payment, which was due at the beginning of the irrigation season.

However, after a review of the facts—the lease, the advertisement, the bid, the prohibition against dry land farming, the requirement that water

charges must be paid, the leasing of lands under an irrigation project supplied with canals and ditches, defendant's familiarity with existing conditions, the Court feels obliged to hold, under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands, although the Superintendent of the reservation, or some one qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts. This does not appear to afford any valid reason for depriving the Government and the Indian allottees of collecting the indebtedness due under the leases. Accordingly, in the Court's opinion, the material allegations of the Complaint having been established by competent proof, judgment should now be awarded plaintiff, and such is the decision of the Court herein. Findings of Fact, and Conclusions of Law, and form of Judgment may be submitted. Exceptions allowed Counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed September 4, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 18th day of January, 1956, and after the introduction of evidence having been submitted to the Court for consideration and decision, upon briefs

to be filed by the respective parties, and the law and the evidence and the said briefs having been duly considered, the Court now makes and files its Findings of Fact and Conclusions of Law as follows, to wit:

Findings of Fact

1.

The Court finds as a fact that all of the lands involved in the issues of this cause are and were at all times in the ownership of the United States of America in trust for certain Indians of the Blackfeet Indian Reservation and under the supervision and administration of the Department of the Interior of the United States. All of said lands are and at all times were included within the Blackfeet Indian Irrigation Project, an agency of the United States of America operated by authority of the Secretary of the Department of the Interior of the United States.

2.

On or about February 1, 1944, the defendant, Robert Aiken, as principal, and the defendants L. A. Wollam and Bernard W. Anderson, as sureties, signed, made and delivered a contract in writing duly approved by the Superintendent of the Blackfeet Indian Reservation for the lease to the said Robert Aiken of certain lands. The document marked Exhibit A and attached to the complaint is a full, true and correct copy of said contract.

3.

By the said contract and agreement, the defend-

ant, Robert Aiken as principal, and the defendants, L. A. Wollam and Bernard W. Anderson, as sureties, did covenant and agree to pay to the plaintiff all operation and maintenance assessments which should be levied against the lands described in said lease and within the Blackfeet Irrigation Project of the Bureau of Indian Affairs, annually in advance on the due date preceding each irrigation season during said lease, including any penalties accruing against the above-described land, pursuant to the existing or future orders of the Secretary of the Department of the Interior.

4.

During the term of said lease hereinbefore referred to, water charges for the years 1945 to 1948 inclusive were assessed against the leased land in the sum of \$2,722.50, which said charges were regularly assessed by the plaintiff and in accordance with the duly promulgated regulations of the Department of the Interior, an agency and department of the plaintiff; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$784.99 accrued to May 31, 1952, and have been assessed for non-payment of said sum, making a total indebtedness due and owing to plaintiff as of May 31, 1952, the sum of \$3,507.49, and interest and penalty continues

to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid. As of October 14, 1957, the date of decision rendered by the Court in this cause, the total sum of principal and interest due, owing and unpaid on the plaintiff's first cause of action is the sum of \$4,385.03.

5.

On or about March 14, 1946, the defendant, Robert Aiken, as principal, and the defendants, Lloyd Campbell and Bernard W. Anderson, as sureties, signed, made and delivered a contract in writing, duly approved by the Superintendent of the Blackfeet Indian Reservation, with the plaintiff for the lease of certain restricted lands of the Blackfeet Indian Reservation described therein, a full, true and correct copy whereof is the Exhibit marked Exhibit D attached to the plaintiff's complaint herein.

6.

By the terms of said farming and grazing lease the said defendant Robert Aiken and his sureties hereinbefore referred to were required to pay operation and maintenance assessments as made. Said lease provides in part as follows:

"It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)."

During the term of said lease there were assessed operation and maintenance charges upon said leased lands by the plaintiff acting through the Department of the Interior, an agency and department of the plaintiff, the sum of \$370.00 for the years 1947 to 1950 inclusive; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$64.74 accrued to May 31, 1952, and have been assessed for non-payment of said sum, making a total indebtedness due and owing to plaintiff as of May 31, 1952, in the sum of \$434.74, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

Conclusion of Law No. 1

The Court concludes from the aforesaid Findings of Fact, from the minutes of the Court, and from the record herein, that plaintiff is entitled to recover, upon its first cause of action, judgment against the defendants, Robert Aiken, L. A. Wolam and Bernard W. Anderson, the sum of \$4,385.03, together with interest on the judgment to be entered herein as by law provided.

Conclusion of Law No. 2

The Court concludes from the aforesaid Findings of Fact, from the minutes of the Court, and from

the record herein, that plaintiff is entitled to recover, upon its second cause of action, judgment against the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95, together with interest on the judgment to be entered herein as by law provided.

Conclusion of Law No. 3

Plaintiff is entitled to recover judgment as set forth in the foregoing Findings of Fact and Conclusions of Law, with interest as by law provided, and for the costs of this action to be taxed in accordance with the rules of this Court.

/s/ CHARLES N. PRAY,
District Judge.

[Endorsed]: Filed Oct. 31, 1957.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil No. 1409

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON, and LLOYD CAMPBELL,
Defendants.

JUDGMENT

Be It Remembered that the above-entitled cause came on for trial on the 18th day of January, 1956, at the court room of said Court at Great Falls,

Montana, before the Honorable Charles N. Pray, the Judge of said Court, sitting without a jury; plaintiff being represented by Krest Cyr, United States Attorney for the District of Montana, Dale F. Galles, Assistant United States Attorney, and Harlow Pease, of the Office of the Field Solicitor, Department of the Interior; and defendants being represented by Julius J. Wuerthner and John P. Wuerthner, Esqs., of Great Falls, Montana. The parties hereto, by their attorneys of record, announced that they were ready for trial. Evidence in behalf of the respective parties was introduced and both parties having rested the Court took said cause under advisement upon briefs to be thereafter filed by the respective parties. All briefs having been filed, and the Court having duly considered the evidence and the law applicable thereto, did on the 4th day of September, 1957, render in writing its decision of said cause. Thereafter the Court made and entered its Findings of Fact and Conclusions of Law which are duly filed in said cause, and incorporated herein by reference.

Now, Therefore, by Reason of the Law and the Premises, It Is Adjudged, that the plaintiff, the United States of America, do have and recover from the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, the sum of \$4,385.03, as provided by Conclusion of Law No. 1 on file herein and that the said plaintiff further recover from the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95, as pro-

vided by Conclusion of Law No. 2 on file herein; that said sums bear interest from the date of this judgment as by law provided and for the costs of this action.

Done and dated this 31st day of October, 1957.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed, Entered and Noted in Civil Docket Oct. 31, 1957.

Office of the Clerk
United States District Court, District of Montana
Great Falls, Montana

October 31, 1957

To: Mr. Krest Cyr, United States Attorney, Butte, Montana. Mr. Harlow Pease, Office of Field Solicitor, Dept. of Interior, Billings, Montana. Messrs. Wuerthner and Wuerthner, Attorneys at Law, Great Falls, Montana.

Notice is hereby given that in Case Number 1409, United States of America vs. Robert Aiken, et al., a Judgment was filed, entered and docketed in the United States District Court at Great Falls, Montana, on October 31, 1957, as follows: * * * "that the plaintiff, United States of America, do have and recover from the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, the sum of \$4,385.03, as provided by Conclusion of Law No. 1 on file herein and that the said plaintiff further recover from the defendants Robert Aiken, Ber-

nard W. Anderson and Lloyd Campbell, the sum of \$553.95, as provided by Conclusion of Law No. 2 on file herein; that said sums bear interest from the date of this judgment as by law provided and for the costs of this action.”

DEAN O. WOOD,

Clerk,

/s/ By E. C. McKEE,

Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Robert Aiken, L. A. Wollam, Bernard W. Anderson, and Lloyd Campbell, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that final judgment given, made and entered in this action on the 31st day of October, 1957.

Dated this 22nd day of November, 1957.

WUERTHNER & WUERTHNER,

/s/ By JOHN P. WUERTHNER,

Attorneys for Defendants and
Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE
RELIED UPON BY APPELLANT

Whereas, Robert Aiken, the above-named Defendant, is perfecting his appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above cause on the 31st day of October, 1957, and has served his designation of the portions of the record in said District Court to be transmitted to said Court of Appeals;

Now, Therefore, the above Appellant designates the following points upon which he intends to rely upon said appeal:

1. That said judgment of the District Court is erroneous in that it adjudges that the Plaintiff, the United States of America have and recover from the Defendants, Robert Aiken, L. A. Wollam, and Bernard W. Anderson, the sum of \$4,385.03 as provided by Conclusions of Law No. 1 filed in said cause; and that the said Plaintiff further recover from the Defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95 as provided by Conclusions of Law No. 2 on file herein.

2. That the judgment of said District Court is contrary to the applicable law covering said action and the evidence adduced herein, and to the terminology of the leases in question;

3. That the evidence is insufficient to justify reformation of the lease as set forth in Conclusions of Law No. 1 herein, and the same was contrary to the applicable law covering said action;

4. That the evidence is insufficient to justify the judgment based upon Conclusions of Law No. 2 herein;

5. Upon the evidence the District Court was without jurisdiction to reform the lease referred to in Conclusions of Law No. 1 herein;

6. That the judgment of said District Court if enforced would amount to unjust enrichment of the said Plaintiff at the expense of the Defendants;

7. That the Plaintiff waived its rights to claim operation and maintenance charges by a failure to collect the same either in advance or during the terms of the leases in question;

8. That the said judgment is erroneous in that it varies the terms of the written instrument referred to in Findings of Fact No. 1 herein.

Dated this 9th day of December, 1957.

WUERTHNER & WUERTHNER,
/s/ By JOHN P. WUERTHNER,
Attorneys for Defendant and
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 9, 1957.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now, the above-named Defendant, by and through his Attorneys of Record, Julius J. Wuerthner and John P. Wuerthner, and designates the following portions of the record herein to be certified to the Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, and which portions of said record are material to the consideration by the said United States Court of Appeals of the appeal herein, and as such shall be printed by the Clerk of said Court:

1. Judgment roll consisting of the following documents:

Complaint,

Answer,

Opinion by the Hon. Charles N. Pray, Presiding Judge,

Findings of Fact and Conclusions of Law,
Judgment;

2. All original exhibits;

3. Notice of Entry of Judgment;

4. Reporter's transcript of the proceedings herein.

Dated this 22nd day of November, 1957.

WUERTHNER & WUERTHNER,

/s/ By JOHN P. WUERTHNER,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Nov. 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit: Complaint, Answer, Opinion of the Court, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Affidavit of Service, and Designation of Record on Appeal are the originals filed in Case No. 1409, United States of America vs. Robert Aiken, et al., and designated by the parties as the Record on Appeal in said cause; and that annexed hereto is a copy of the notice of entry of judgment given to defendants in the said cause; and I further certify that I transmit herewith as a part of the Record on Appeal the Reporter's Transcript of Evidence filed on November 18, 1957, and the exhibits called for in appellant's Designation, to wit: plaintiff's exhibits Nos. 1, 2, 3, 4, 7, 8, 9, 10, 14 and 15, and defendants' exhibits Nos. 6, 11, 12 and 13.

Witness my hand and the seal of said Court at Great Falls, Montana, this 6th day of December, A. D. 1957.

[Seal] /s/ DEAN O. WOOD,
Clerk as aforesaid.

In the District Court of the United States, in and
for the District of Montana, Great Falls Division

Civil No. 1409

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT AIKEN, et al.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Charles N. Pray, United States District Judge, at Great Falls, Montana, on January 18, 1956, 10:00 a.m.

Appearances: Mr. Krest Cyr, United States Attorney, Butte, Montana, Mr. Dale Galles, Assistant United States Attorney, Billings, Montana, for plaintiff. Mr. John Wuerthner, of Wuerthner & Wuerthner, Attorneys at Law, Great Falls, Montana, for defendant. [1]*

Proceedings

The above entitled cause came on regularly for trial before the Honorable Charles N. Pray, United States District Judge, presiding without a jury, at Great Falls, Montana, on January 18th and 19th, 1956; whereupon the following proceedings were had and done, to-wit:

The Court: Gentlemen, are you ready to proceed?

* Page numbers appearing at bottom of page of Original Transcript of Record.

Mr. Cyr: We are ready to proceed.

Mr. Julius Wuerthner: We are ready, your Honor.

The Court: Do you desire to make a brief statement?

Mr. Cyr: Just briefly. I would like to move the name of Harlow Pease be entered as counsel on behalf of the Government also.

The Court: Very well.

Mr. Cyr: Primarily the issue is whether or not the Government is entitled to rentals for operation and maintenance of an irrigation district of land which was owned and leased by Robert Aiken. As an incident of that one of the questions which will arise and has arisen from the pleadings is what the lease meant; there were some omissions from the lease. We think, however, that the matters which have been omitted have been admitted in the pleadings and now resolve that question and there is only the necessity of briefing the matter for the court. Specifically Exhibit A attached to the complaint has been admitted by the defendant; that is the sale of the farming and grazing leases in which [4] it is stated that dry land farming is prohibited in this area and water rent is payable in advance. That is at the end of paragraph 4 of Exhibit A. Pursuant to that the land was leased by Mr. Aiken. The bid was accepted, which is marked Exhibit B and admitted by the defendant. The lease Exhibit C is admitted by the defendant also and we think we have presented all of the questions and the evidence before the court as to

what was meant in the lease. There is in addition the issues admitted in the pretrial conference. Now it appears to be the contention of the defendant from the pleadings the land was not irrigable, that there was no point of delivery on the land, that no assessment was ever made and that there was no notice of the assessment ever delivered to the defendant. Now I think those are the issues of fact which are in the case and we will make our proof on that. There are two leases, the 44 and 46 leases, which are the first and second causes of action respectively.

The Court: As I remember, I glanced at the pleadings the other day and as I recall there was no demand ever made for the payment of those annual assessments until suit was begun?

Mr. Cyr: Well, your Honor, I think in 1948 the proof will show in 48 an assessment was made and copy of that assessment was mailed to Mr. Aiken and notice actually given to him. [5]

The Court: I just happened to pick that up from my memory they contend there was no demand made until you began suit.

Mr. Cyr: Yes.

The Court: Very well, do you defendants desire to make a brief statement of your position?

Mr. John Wuerthner: Your Honor, we would like to reserve our statement at this time.

The Court: Very well.

PAUL G. ANSPACH

was called by plaintiff and having been duly sworn testified as follows:

Direct Examination

Q. (By Mr. Cyr): Would you state your name, please, sir? A. Paul G. Anspach.

Q. What is your occupation?

A. At present I am retired.

Q. What did you do before you retired?

A. I was Project Engineer of the Blackfeet Irrigation Project.

Q. And how long did you occupy that position of Project Engineer?

A. Well the last session up there was from June 1938 until August, 1950. [6]

Q. And you were also Project Engineer prior to that time? A. Yes, from 24 to 33.

Q. What is your profession, Mr. Anspach?

A. Civil Engineer.

Q. And you were at all times as the Project Engineer a Civil Engineer? A. That is right.

Q. I will hand you what has been marked Plaintiff's Exhibit 1 and ask you if you can recognize what is represented on that?

A. Well it represents the two leases of Mr. Aiken on Badger Fisher Unit of the Blackfeet Project.

Q. Can you tell from that—I see part marked in green and part in red—do you know which portion refers to which lease?

A. I know part of the green refers to the 44

(Testimony of Paul G. Anspach.)

lease but I am not familiar with all the descriptions.

Q. And referring to that do you recognize that as a topographical map of the area involved in this case?

A. That is right.

Q. And referring to the red marks which appear on Plaintiff's Exhibit 1, what do those represent?

A. Those represent ditches. [7]

Q. And the heavy blue lines which appear?

A. They are what we call minor laterals.

Q. The red ones are referred to as major laterals?

A. Yes, sir.

Q. And does that fairly and accurately portray the land as situated and the ditches as situated geographically?

A. It does.

Mr. Cyr: We will offer for the purpose of illustration Plaintiff's Exhibit No. 1.

Mr. John Wuerthner: May I briefly question the witness, your Honor?

The Court: Very well.

Q. (By Mr. Wuerthner): Referring to Plaintiff's proposed Exhibit 1 will you tell me who prepared that exhibit?

A. No, I can't tell you who prepared this exhibit because it is prepared from a geological survey map.

Q. Again referring now to the map itself did you prepare it or was it prepared under your direction?

A. No.

Q. Referring to the red lines and the blue lines and the shaded area, was that done by you or under your direction?

A. Neither.

(Testimony of Paul G. Anspach.)

Q. You know nothing about that portion of the exhibit?

A. No, not the exhibit itself. [8]

Mr. Wuerthner: Was this offered in evidence?

Mr. Cyr: It was offered only for the purpose of illustration. We don't contend this has any probative value. It is our position and so the court and counsel will know where the land is located geographically and for the purpose of identifying the location of the ditches and the land that is the purpose.

Q. (By Mr. Wuerthner): May I ask you if you identify the green shaded portion?

A. As I said part of it I know definitely because we had considerable discussion about it and I have had correspondence about it since I left the project. I don't recall exactly these units. I am pretty sure of these but I don't recall those units.

Q. You didn't have anything to do with the shading of the green? A. No.

Q. And you don't know what the green shaded area represents?

A. Not definitely except as I say my correspondence with the area office I know that is north half of section 30 and township 31 north, range 5 West.

The Court: You might find out when was the last time he went over that area and whether he had that map and compared [9] that map with the area or whether he thinks that generally exists.

Q. (By Mr. Wuerthner): Now you have testified this green area has to do with the 44 lease?

(Testimony of Paul G. Anspach.)

A. That is right.

Q. Whose 44 lease?

A. The lease to Mr. Robert Aiken.

Q. Where did you get your information this refers to the 44 lease?

A. I have checked this with the proof maps; our project maps that I have worked over for years.

Q. You have checked and did you do the shading? A. I did not.

Q. Do you know who did it?

A. (No answer in copy.)

Q. And you have compared this green area with the project map you say?

A. I have compared this map with the project map for ditches and locations to the land.

Q. Did you have anything to do with making up the project map? A. Yes.

Q. And when was that?

A. The project map was originally made up in 32 and 32 and revised in 41. [10]

Q. What is this map based on?

A. That map is based I believe on an aerial map of that area and the Geological Survey.

Q. And when was that the aerial survey was made? A. I couldn't tell you.

Q. You don't know? A. No.

Q. And the survey map has it been revised since 31?

A. 41. It was made in 31 and revised in 41.

Q. And you don't know when this was made from that map? A. No.

(Testimony of Paul G. Anspach.)

Q. You don't know the date this map was made?

A. No.

Q. Did you ever go over this ground shaded in green? Do you know whether or not the shaded area conforms with the lease you testified with Mr. Aiken?

A. Not over the ground but we have had the description in the project office.

Q. Where did you get the description?

A. From the lease.

Q. And were the descriptions part of the project map? A. They are tabulated.

Q. What do you mean by that?

A. They were tabulated in a schedule of the acreage under lease subject to irrigation. [11]

Q. And where was the schedule prepared?

A. The schedule was prepared in the irrigation project office.

Q. Did you prepare it?

A. I couldn't say that I definitely or whether the clerk did; some the clerk did and some I did.

Q. It was more or less prepared under your supervision?

A. It was. It was generally checked by me.

Q. Now these other marks represented alone where did these come from?

A. Which other lines?

Q. These red and blue lines which appear, where did that information come from.

The Court: I think you had better reserve your further examination until cross examination. I

(Testimony of Paul G. Anspach.)

think this is only for illustrative purposes. The court really wanted to find out how much he did know about it, whether he ever compared that map with any trip he made over the project and over the land involved in the lease.

Mr. Cyr: With that in mind I will withdraw my offer at this time and lay further foundation.

The Court: Very well.

Q. (By Mr. Cyr): During the time you were project engineer did you have occasion to go over all the land which was a part of that project? [12]

A. No.

Q. Did you have occasion to determine whether or not the lands within the project were irrigable or not irrigable? A. Did I have what?

Q. Did you have occasion to determine whether the lands were irrigable or not irrigable within the project? A. Yes.

Q. And specifically did you make a determination of whether or not the lands which were leased by Mr. Aiken were irrigable within the project?

A. Well that is according to what you mean by the word determination. We did determine the irrigable acreage that had been determined by land designation survey and the schedules.

Q. Maybe what I should ask you is what did you do with reference to that land?

A. We determined for the Agency the acreage that was then susceptible or land to which service could be made at the current time.

(Testimony of Paul G. Anspach.)

Q. Now referring you to Plaintiff's Exhibit No 2, do you recognize that?

A. Yes, that is the regular form.

Mr. Wuerthner: Just a minute, I believe the answer to that would call for yes or no. We object to any gratuitous statements. [13]

Q. What is it?

A. Do I recognize it, yes.

Q. What is it?

A. It is a status account in the irrigation project and was to set up and show the irrigable acreage, the current year's charges on each 40 acres or smaller if there was allotted smaller tract under the lease.

Q. What lease?

A. This Robert Aiken lease which was the general rule for all leases.

Q. And what year lease does that refer to?

A. This starts in 44.

Q. Now was that prepared under your supervision and direction while you were project engineer?

A. It was.

Q. And from information gathered by you in the field?

A. And the file and from our office records.

Q. And the land descriptions which appear on there were determined to be the lands included within the lease by you or under your supervision, is that correct?

A. Yes, sir.

Q. Now comparing that with what has been marked as Plaintiff's Exhibit 1 do the markings

(Testimony of Paul G. Anspach.)

on that indicate the portions which have been marked in green therefrom? [14]

A. Well I would have to check it over.

Q. Would you do that please?

A. It conforms with the green shaded area.

Q. It conforms with the green shaded area information, conforms with the description contained in Plaintiff's Exhibit 2? A. Yes.

Q. And you have said that this Plaintiff's Exhibit 2 was prepared under your supervision and direction at the time you were project engineer?

A. It was.

Mr. Cyr: We will offer in evidence Plaintiff's Exhibit 2 and renew our offer as to—well, not yet.

Q. (By Mr. Wuerthner): Referring to Plaintiff's Exhibit 2 I will ask you if this is the original or a copy from the original?

A. Well I would say this is the original.

Q. Are you sure? Can you definitely say whether or not that is the original?

A. No, I don't believe I can definitely say.

Q. If that is not the original do you know where the original is? A. No.

Q. And there are several amounts shown upon here, can you tell us where those amounts came from? [15]

A. Now which amounts do you refer to?

Q. Individual figures?

A. Individual amounts or the total?

Q. I am referring to both, the individual amounts and the totals as shown there.

(Testimony of Paul G. Anspach.)

A. The individual amounts are the current year's O & M charges against the tract of land.

Q. Where did those amounts come from?

A. They come from amounts computed from irrigable acreage on the land setup by the O & M order that come out from the Washington office.

Q. Where is the computation of those amounts?

A. Where is the computation?

Mr. Cyr: We will object to the question as improper on voir dire, your Honor. I don't know where the materiality is where the computation was made. This witness testified it was under his supervision and direction.

The Court: It was made by rates established by the Secretary of the Interior?

Mr. Cyr: Yes but I think he is asking here where the computation was made.

Mr. Wuerthner: Your Honor, I believe our position is whether this is hearsay testimony or whether this is the original. [16]

Mr. Cyr: In that respect we will establish these are part of the official records of the Project. The present Project Engineer is here. We will put that on.

The Court: Very well, there is no need to detail any more of that.

Mr. Wuerthner: I have one more question, your Honor.

The Court: All right.

Q. Can you tell me when this exhibit was made?

A. This exhibit was made in 44 and the figures

(Testimony of Paul G. Anspach.)

set up in type were set up at the time it was made. The figures that are in longhand were set up currently to apply to the current season. There was one of these made for every lease for the full period of the lease and as set up in type and the following information was put on there by longhand as it became current.

Q. And you know of your own knowledge these so-called figures were made up in 44?

A. The typed figures were made up in 44 and the others were made up the current year shown.

Q. And they were made up under your supervision?

A. In this particular case, yes.

Mr. Wuerthner: May it please the court, to the introduction into evidence of Plaintiff's Exhibit 2 the defendant objects on the ground and for the reason that by [17] the witness' own testimony it appears to be hearsay, and that he has testified he is not sure whether it is made from the original or whether this is the original so any testimony in this regard will be hearsay unless further established.

Mr. Cyr: We will withdraw our offer until he testifies.

The Court: Very well.

Q. (By Mr. Cyr): I will show you what has been marked as Plaintiff's Exhibit 3 and ask if you will identify that, please?

A. Well it is another lease that began in 46 to

(Testimony of Paul G. Anspach.)

Mr. Robert Aiken on trust patent land and the schedule set up in the project irrigation office.

Q. What is that? That is not a lease?

A. No, that is a schedule of irrigable lands included within the lease.

Q. 46? A. 46 lease.

Q. Now was that prepared under your direction and supervision? A. It was.

Q. Where you were the Project Engineer?

A. Yes.

Q. Now referring to the descriptions contained in there [18] and portion marked in red on Plaintiff's Exhibit 1, can you identify and conform one with the other?

A. There are two tracts shaded in red that aren't included in the irrigable schedule, presumably they are dryland farms.

Q. That is there are two descriptions in Plaintiff's Exhibit 3 described in Plaintiff's Exhibit 3 which are not contained in Plaintiff's Exhibit 1?

A. No, Plaintiff's Exhibit 3 does not show two tracts that are shaded in red.

Q. And can you mark those two with an X or with the pencil?

A. Well now the others are marked with an X.

Q. Well put a circle around it, please?

A. That is the irrigable part is marked with an X, and this unit here and this unit here are not included as irrigable lands.

A. It would be the northwest of the southeast of section——

(Testimony of Paul G. Anspach.)

Mr. Wuerthner: Your Honor, we are going to object to this testimony on the ground the exhibit speaks for itself.

Mr. Cyr: It is just further foundation really.

The Court: Yes, go ahead and lay your foundation.

A. That is the northwest of the southeast of section 29-31-5, and the southeast of the southwest of section 29-31-5. They are not included in the irrigable schedule. [19]

Q. Which is marked as Plaintiff's Exhibit 3?

A. That is right.

Q. Do you know why those weren't included in Plaintiff's Exhibit 3?

A. They contained no irrigable land.

Q. And I will hand you what has been marked as Plaintiff's Exhibit No. 4 and ask if you can identify that, please?

A. That is the office copy of a statement or memorandum that was mailed to Mr. Robert Aiken of the amount unpaid for irrigation assessments against his lease.

Q. And that was done under your direction and supervision? A. It was.

Q. At the time you were Project Engineer?

A. Project Engineer.

Q. And also done on the date which appears on there?

A. I couldn't remember now whether it was on that date or not.

Q. Can you tell me whether or not there was a

(Testimony of Paul G. Anspach.)

point of delivery on the lands which were leased by Mr. Aiken which are described in what has been marked as Plaintiff's Exhibits 2 and 3?

A. There was.

Mr. Wuerthner: Just a minute, we are going to object to that question on the ground the witness hasn't shown himself qualified to answer the question. He has not [20] physically been over the land and has not positively studied the so-called blue and red marks which appear on that exhibit which is not yet in evidence.

Mr. Cyr: We are not referring to the exhibit, your Honor; we are asking if he knows.

The Court: Perhaps you better lay a foundation on what he knows and how he knows it and whether he has been over the land and examined it physically and that sort of thing.

Q. You have stated you were Project Engineer for what period of time, Mr. Anspach?

A. During this period 38 until 50.

Q. And during that period did you have occasion to go over to the land that was leased by Mr. Aiken which is in issue in this case?

A. I did but it was prior to the time Mr. Aiken leased it, however.

Q. It was prior to the time Mr. Aiken leased it?

A. Yes.

Q. Did you observe or did you have anything to do with the construction of the major lateral ditches to that land?

Mr. Wuerthner: Just a minute. We are going

(Testimony of Paul G. Anspach.)

to object to that; he was on the land prior to this ditch in question and there is no testimony those ditches are the same or different. [21]

The Court: Perhaps if you give him an opportunity, he will do so before he gets through with the examination. Go ahead.

Q. Did you observe any ditches on the land or leading to the land?

A. Yes and I helped survey some of the ditches that are on the land.

Q. Did you assist in the laying out of the location of them and supervised during the time of construction? A. Absolutely.

Q. And was that work on both the major laterals of the project and what is referred to as minor laterals? A. That is right.

Q. Now then for the court describe the difference between a major lateral and a minor lateral?

A. Well a major lateral, what we term a major lateral would carry possibly 25 to 50 second feet of water, which would serve numerous smaller laterals, delivering to the land.

Q. And what would be the minor laterals?

A. The minor laterals would be in the neighborhood of 5 to 10 second feet service to individual tracts.

Q. Do you know whether there were major laterals delivering water to minor laterals on the property which is in question? A. I do. [22]

Mr. Wuerthner: Just a minute, unless the time is fixed, we will object to that question.

(Testimony of Paul G. Anspach.)

The Court: The time of the lease, date of the lease, when was it? When was this examination made?

Mr. Cyr: That is what I am going to ask him. I don't know, he was on the land for years and I don't know when the major laterals were constructed but I am going to go ahead and examine as to that.

The Court: Just find out the date.

Q. What were the dates?

A. The major laterals for the project were surveyed and constructed before I went on the project some place around '16 when the initial major laterals were constructed.

Q. Were they on the land?

A. They were on the land.

Q. And you have personally observed them?

A. A good many times.

Q. Now how about the minor laterals?

A. Some of the minor laterals, they were built at the same time. The minor lateral system has been used from year to year to serve lands as they are put into operation and there are still lots of them to build yet. There are still proposed minor laterals all throughout the project.

Q. Now with reference to the major laterals and minor laterals which serve the lands leased by Mr. Aiken, were they [23] first surveyed and constructed while you were Project Engineer?

A. The extensions as to that particular line was.

(Testimony of Paul G. Anspach.)

Q. And that was at the time Mr. Aiken was leasing the land?

A. They were built prior to that time. They were built prior to 41.

Q. But they were actually physically located and constructed at the time he leased the land?

A. They were.

Q. I will ask you if you know whether or not there was a point of delivery on those minor laterals for delivery of the water to the lands of Mr. Aiken?

A. There was. The laterals were constructed to the land and if the lateral extended, wherever the lateral extended beyond that land there would be headgates to turn out the water.

Q. And was that true in all cases?

A. Only in cases where the lateral is constructed just to that land there wouldn't be a headgate.

Mr. Wuerthner: May it please the court, in order that none of us have been misled, there has been no time fixed for this man's testimony and it has been speculative as far as we are concerned.

The Court: I will overrule your objection; there has been a time laid during the continuance of this [24] lease he testified a few moments ago. Go ahead, Mr. District Attorney.

Q. Where was the point of delivery on the lands here in question, Mr. Anspach?

A. Well there would be several on that. There is no one point of delivery that would serve all of that land because it is more or less rolling land.

(Testimony of Paul G. Anspach.)

There is one definite half section there which has a hogback running from southwest to northeast, and the point of delivery would be on that ridge at the highest point that the ditch could come into it, and that ditch was eventually carried right straight down that ridge to the land shown.

Q. Was that true in all instances, the delivery to the highest place on the land?

A. The highest place the ditch system could reach.

Q. And in this instance were there points of delivery for the delivery of water to all of the lands which have been described and which you have identified in Plaintiff's Exhibits 2 and 3?

A. There are.

Mr. Cyr: Your Honor, we request permission to withdraw this witness for a few moments and put on additional foundation testimony for the offering of these exhibits.

The Court: Very well. [25]

MARK W. STOUT

was called as a witness by plaintiff and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Cyr): Would you state your name, please?

A. Mark W. Stout.

Q. Where do you reside?

A. Browning, Montana.

Q. And what is your occupation and profession, Mr. Stout?

(Testimony of Mark W. Stout.)

A. Project Engineer.

Q. And what project?

A. The Blackfeet Project, Blackfeet Indian Project on the Reservation.

Q. And you have been present while Mr. Anspach testified? A. Yes, sir.

Q. Did you replace him at the time he retired?

A. I started in '50.

Q. And that is the same project which Mr. Anspach has described? A. Yes, sir.

Q. I will hand you what has been marked Plaintiff's Exhibits 2, 3 and 4 and ask you if those are a part of the official records of your office? [26]

A. Yes, sir, they are.

Q. And are you the official custodian of those records? A. Yes, sir.

Mr. Cyr: We offer in evidence Plaintiff's Exhibits 2, 3 and 4.

Mr. Wuerthner: May I ask the witness some questions?

The Court: Yes.

Q. (By Mr. Wuerthner): Mr. Stout, you have testified that you didn't become Project Engineer until '50, is that correct?

A. That is right, sir.

Q. And you knew nothing about the lease in question as it terminated prior to that time, is that correct? A. Yes.

Q. And were these records made under your supervision? A. No.

Q. You were not Project Engineer at the time

(Testimony of Mark W. Stout.)

these records were made? A. No.

Q. And you don't know of your own knowledge about these records?

A. No, sir, as far as the lease is concerned I don't.

Q. And you don't know then whether or not these exhibits are correct?

A. All they are is a record of the office. They are official records. [27]

Q. I see a notation here, June 6, '51, in this file, is that your writing? That is Plaintiff's Exhibits 4 and 3.

A. No, that is not my writing; that is the clerk's writing.

Q. And the clerk made that up? A. Yes.

Q. As far as you know?

A. As far as I know.

Q. And you don't know of course anything that happened in '44 and the years subsequent to that time prior to your employment as Project Engineer?

A. In what respect?

Q. Well you don't know anything about the correctness of those records as you were not Project Engineer when they were made up?

Mr. Cyr: We object to this as improper voir dire; the foundation is laid, and the witness does not know anything about them. He is an official custodian of the official records of the office. That is the only foundation we have used on this witness.

Mr. Wuerthner: Very well, I will withdraw that last question.

(Testimony of Mark W. Stout.)

Q. Do you know whether or not those are original records or copies of the originals?

A. I could not answer that. [28]

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibits 2 and 3 and 4 we will object on the ground no sufficient proper foundation has been laid, and there has been no testimony whether these are originals or copies, and there is further testimony that the witness was not the official custodian of the records at the time they were made up.

Mr. Cyr: Your Honor, under the federal rules they are part of the official records of the Government's officer and who is the official custodian of them. The materiality of the records has been established by Mr. Anspach under whose direction and supervision the records were prepared from personal conduct of the affairs of the office during the time this lease was in effect by Mr. Aiken. We think the foundation has been laid and they are now admissible in evidence for the purpose of establishing that assessment was made of this land and that it was determined water was available to it without exception on the two areas marked by Mr. Anspach. These records are admissible in themselves as official records of the Government and identified.

The Court: Yes, they are official records of the office. I will overrule your objection and they may be admitted in evidence.

Mr. Cyr: That is all. You may step down. Do you have some questions? [29]

Mr. Wuerthner: Will he remain?

Mr. Cyr: Yes.

Mr. Cyr: Do you wish to cross examine him?

Mr. Wuerthner: Not at this time.

Mr. Cyr: Mr. Anspach.

PAUL G. ANSPACH

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Cyr): Now referring to Plaintiff's Exhibit No. 2 there appears on there certain figures, can you state to the court what those figures represent?

A. The figures represent the irrigation charge for the described unit for each current year. Do you want me to go to any length into it?

Q. Yes. Now would you describe how much was due in each year?

Mr. Wuerthner: We will object to that on the ground the exhibit speaks for itself.

Mr. Cyr: That is fine. I was just going to go through it for the record.

Q. With reference to the figures which appear at the bottom are those the totals of the amounts due? [30]

A. The totals of the amounts due. That is the capital amounts due for each year of the irrigation system.

Q. What do you mean by capital?

(Testimony of Paul G. Anspach.)

A. Well there is no penalty upon that applied; for nonpayment there is a penalty and the statements showed the penalty computed up to a certain time.

Q. I will refer you to the S.F. which appears on the right column of '44, what does that mean, Mr. Anspach?

A. Presumably, I haven't the lease, but the terms of the lease permit him one year on that lease without assessment or construction charges for weed eradication.

Mr. Wuerthner: We move that the latter part of the answer be stricken.

The Court: Well he can just speak of his own knowledge and not from his recollection of the lease.

Mr. Cyr: Your Honor, I believe this language is contained in the pleadings and conceded in the pleadings and further it is an explanation of the meaning——

The Court: What is that?

Mr. Cyr: That it was an offset for this one year. This is to the benefit of the defendant; he was not charged for that year by reason of some weed eradication.

Mr. Wuerthner: That was presumed, he used the word presumably and it is speculation, your Honor.

Mr. Cyr: It is immaterial to us. [31]

The Court: That is what I wanted to know, whether he could be not speculating about it.

Mr. Wuerthner: There's too many of those leases

(Testimony of Paul G. Anspach.)

and I can't recall every lease that people talk about in their testimony.

Q. Do you know what it is?

A. S.F. referred to privilege of summer fallow that year and no charge was made.

Q. S.F.? A. Stands for summer fallow.

Q. You know that of your own knowledge?

A. Yes.

Q. Do you know of your own knowledge that was put on all of these status of water rentals?

A. Wherever provision was made in the lease they would have summer fallow.

Q. You know that of your own knowledge?

A. Yes.

Q. I will ask if any charge was made against Mr. Aiken for the year '44?

A. Not on the '44 lease.

Q. On subsequent years there was a charge made in the amount provided? A. That is right.

Q. Now I will hand you what has been marked [32] Plaintiff's Exhibit 3 and is the same thing true of the S.F. which appears on that?

A. Yes, in 46, which gives the privilege of summer fallowing and no charge.

Q. No charge for the year 46?

A. That is right.

Q. Now I will hand you what has been marked as Plaintiff's Exhibit 4, do you know whether any notice of assessment was mailed to Mr. Aiken prior to that? A. Not to my knowledge.

(Testimony of Paul G. Anspach.)

Q. And you were Project Engineer during all that time prior to that time?

A. The Project did not send out any statements prior to that time. This was a memorandum to Mr. Aiken sent from the Project office. The Agency office was the official billing office.

Q. And what was the reason for that one being mailed out at that time, if you recall?

A. Simply the fact our record showed no payment was made and we were notifying him of that fact.

Mr. Wuerthner: May it please the court, I don't know what he testified regarding. He is testifying regarding a memorandum and some copies. Now we have been served with no subpoena duces tecum to produce the original memorandum and we are wondering now if he is testifying from his copy.

A. That is an office record copy.

Mr. Wuerthner: There has been no demand made for the original, your Honor. And no foundation laid now for any secondary evidence of the contents of that memorandum.

Mr. Cyr: This is a part of the official records of the office, your Honor. It has been admitted in evidence?

The Court: Yes.

Q. (By Mr. Cyr): So, referring again to what has been marked as Defendant's Exhibit No. 1, which you have identified, does that accurately portray the location of the major laterals and minor

(Testimony of Paul G. Anspach.)

laterals in the areas of the lands which were leased by Mr. Aiken? A. Yes.

Q. And I believe you have stated that the portion marked in green represents after comparison with Plaintiff's Exhibit 2 the lands described in Plaintiff's Exhibit 2 as irrigable?

A. Not all of the land shaded is irrigable but the land that is included in the 40 like a point and so on some of those tracts are irrigable which the schedule will show the acreage of each 40 acre tract and the amount which is irrigable.

Q. There is irrigable land in each of those tracts? A. That is right.

Q. And that is the land which is included in the lease [34] which you determined to be susceptible to irrigation? A. That is right.

Q. And the portion of land and the same is true of that with reference to the 46 lease?

A. Yes, sir.

Q. With the exception of the two quarter sections that you said were included in this statement?

A. That is right, contained no irrigable land.

Q. And that was for the reason those two quarter sections contained no irrigable land?

A. That is right.

Mr. Cyr: We renew our offer for the purpose of illustration of Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Wuerthner: Is this for illustrative purposes only?

(Testimony of Paul G. Anspach.)

Mr. Cyr: Yes, that is all.

Mr. Wuerthner: It is my understanding this topographical map does not show the entire position on all of the laterals it shows?

Mr. Cyr: That is correct.

A. That is correct, just that section involved.

Q. (By Mr. Wuerthner): May I inquire if this map does show the boundary of the project for the project this map represents? [35]

A. I don't believe—no—we have a project map here that shows the boundaries of this portion.

Q. You don't know whether or not the boundary is in relation to the certain area?

A. No, it would only be a guess on my part.

Q. What is the date of that map?

A. I do not know, as I said before.

Q. And when were those areas shaded in?

A. I cannot tell you that.

Q. When were those lines colored blue and red?

A. I don't know; I had nothing to do with the map.

Q. Could it have been twenty years ago?

A. No.

Q. Could it have been ten years ago?

A. Yes.

Q. Could it have been last year?

A. Well it could have been last year and it could have been last week as far as that is concerned.

Q. I am referring now to the position or placing

(Testimony of Paul G. Anspach.)

of these various laterals you testified to, when were they inserted?

A. I don't know when this map was made or when these lines were colored in. I know that we had service over to this area in '41.

Q. What do you base that on? [36]

A. Our project maps.

Q. Which are not in evidence yet?

A. Yes, well——

Q. Now may I ask you to what year does this map refer to in the placing of these lateral lines?

A. It would be subsequent to '41. This lateral was not extended through here in '41; it was at this point in '41.

Q. You are referring now to a point which is on the edge of? A. On this high area.

Q. Section 30 in the west edge?

A. Section 30.

Q. Now could those lines or those laterals have been placed after '49?

A. According to this map?

Q. Yes.

A. This extension here could have been placed after that.

Q. Which extension?

A. Over 30 to the land beyond it?

Q. What I am getting at, Mr. Anspach with the map as portraying these various laterals what year does that represent?

A. I don't know. I don't know when this map was made.

(Testimony of Paul G. Anspach.)

Mr. Wuerthner: May it please the court, we will renew our objection to Plaintiff's proposed Exhibit 1 on the [37] ground there has been no sufficient foundation laid. The witness has not placed the time that these various laterals existed and he has not fixed any time at all for the map here shown that they are attempting to introduce into evidence.

The Court: Well if it is introduced for illustrative purposes, it would have to be denominated very general indeed with all these qualifications I am not certain that it would serve any relevant useful purpose with the uncertainty of this witness as to its origin and what it included and when the laterals were put on or when the extensions were made; I will sustain the objection.

Mr. Cyr: I want you to understand we are just offering it for the benefit of counsel and the court in referring to it.

The Court: We will take a recess. (11:00 a.m.)

(Court resumed, pursuant to recess, at 11:15 a.m. at which time all parties and counsel were present.)

Mr. Cyr: Your Honor, if we can have another ten minutes it looks as if we can agree on this Plaintiff's Exhibit 1.

The Court: Very well, we will take ten minutes recess. (11:15 a.m.)

(Court resumed, pursuant to recess, at 11:35 a.m., at which time all parties and counsel were present.)

(Testimony of Paul G. Anspach.)

The Court: Are you ready to proceed? [38]

Mr. Cyr: Your Honor, counsel for the defendant has agreed to stipulate that the Government's Plaintiff's Exhibit 1 may be introduced for illustrative purposes; that the portion marked in green represents the 44 lease, the portion marked in red represents the 46 lease; that the lines in red are the major laterals and that the lines in blue are the minor laterals. Now there is a dispute between us as to the terminus of the minor laterals which we will bring out by testimony, but for the purpose of illustration the defendants also want to stipulate this was on the extreme east end of the project.

Mr. Wuerthner: Does this map show the eastern terminus of the project?

Mr. Cyr: This map does not.

Mr. Wuerthner: There is some more beyond that, is there?

A. It could be shown on that map but it does not; that is the eastern terminus of that particular area of the project.

Mr. Cyr: So immediately to the east of the lands described and marked in red and in green on this map there is no more project; that is the eastern terminus of the project on the east end?

A. I beg your pardon, there is a little bit on there.

Mr. Wuerthner: Why don't you make a red pencil mark [39] on the eastern terminus and I will stipulate?

(Testimony of Paul G. Anspach.)

Q. Well I would have to have the project map to do it from.

Mr. Cyr: And they will further stipulate that the portion which is marked on the extreme east part of the map which would be the right-hand side of Plaintiff's Exhibit 1 which is in green and red pencil and on the bottom of the red portion which has been identified as the 46 lease is this witness' best recollection as to the east boundary of the project, eastern and southeastern.

The Court: Very well, it may be admitted under those conditions.

Q. (By Mr. Cyr): Now referring to Plaintiff's Exhibit 1 can you identify for the court the terminus of the ditches leading to the lands which were leased by the defendant Aiken?

A. They are depicted on here in blue and red circles as the terminus of the minor laterals to the land.

Q. And at what date was that, do you remember?
A. That was in 41.

Q. And so the extension of the ditches beyond what appears in blue and red circles was subsequent to 41?
A. Subsequent to 41.

Q. Do you know when they were made?

A. No. [40]

Q. Now you have reference to the blue portion, now referring to the main lateral, one of which terminates on the land?

A. That is just a question of opinion which is major and which is minor lateral. In that case I

(Testimony of Paul G. Anspach.)

would call it a minor lateral because it terminates right at that point; there is no projected extension beyond.

Q. Now referring to Plaintiff's Exhibit 1 how many ditches either minor major laterals terminated on this land in 41?

A. There was three that terminated on the land.

Q. And were there any that terminated at the edge of the land?

A. Well they all terminated at the edge of the land; one does not quite reach the land.

Q. Would you describe those three now by the terminus, the location of the terminus geographically by section and range if you can?

A. The north one was terminated at the northwest quarter of the northeast quarter of the northwest quarter of section 25-31-6. The next one terminated——

Q. And that is the next one to the south?

A. The next one to the south terminated a little over, a little south of the southwest quarter of the northwest quarter—pardon me that is incorrect—a little south of [41] the southwest quarter of the northwest of the northwest of Section 30-31-5. And the next one to the south terminated in the northwest quarter of the northeast quarter of the southwest quarter of 30-31-5. Then the fourth one terminated about an eighth of a mile west of the southwest corner of the northeast quarter of the southwest quarter of 30-31-5.

Mr. Wuerthner: Would you have the witness

(Testimony of Paul G. Anspach.)

mark those as 1, 2, 3 and 4 for our identification?

Q. As you have identified them would you mark them in the same order in which you have identified them as 1, 2, 3 and 4?

The Court: What identification marks did you put on?

A. Just the figures 1, 2, 3 and 4 in blue pencil.

Q. In the same order?

A. In the same order that I described them.

Q. Now that was the physical location of these ditches at the terminus of these ditches at the time you determined the susceptibility of irrigation to this land, was it? Strike that question; it is kind of difficult. Referring to Plaintiff's Exhibits 2 and 3 the descriptions which are contained in those were made on the basis of the location of the ditches as you have described them as existing in 41?

A. They are.

Mr. Cyr: You may examine. [42]

Cross Examination

Q. (By Mr. Wuerthner): You have stated you were project engineer originally on this project from 24 to 33? A. That is right.

Q. Where were you prior to 24?

A. Well I worked for the Bureau of Reclamation on this same project only on one unit of the project.

Q. Have you had any special training in your capacity as project engineer?

A. Well I don't know, 30 years of it might be.

(Testimony of Paul G. Anspach.)

Q. Does your training consist solely of experience? A. No.

Q. Did you have any formal education to prepare you for this type work?

A. As a Civil Engineer at Ohio Northern University.

Q. You got a degree in civil engineering?

A. Civil Engineer.

Q. Now I believe earlier this morning that you testified that you didn't go over the land personally to determine whether or not it was irrigable?

A. Now I didn't say that; I said I didn't go over the land personally in respect to the boundaries of this lease; I have been over the land many times in the surveys [43] and locations of the ditches.

Q. Do you know whether or not any water was furnished on that land at the time this lease was entered into or during the term of the leases in question?

A. No, there was no water delivered.

Q. No water delivered?

A. No water delivered to it.

Q. Can you tell the court from examination of the Plaintiff's Exhibit 1 the furthest boundaries that the water reached during the term of these leases?

A. It reached to the, that would be the, around the indicated No. 2 lateral at this point here.

Q. Now it is your testimony that there was water? A. Available at that point.

(Testimony of Paul G. Anspach.)

Q. The water was available at point No. 2?

A. Available at point No. 2.

Q. On what do you base that answer?

A. Because we had ditches to it.

Q. Because there were ditches?

A. Because there were ditches to it.

Q. The fact that you have ditches does that indicate the water will reach that point? A. Yes.

Q. In other words, if the ditch is dug the water will flow through the canals to the point you have indicated? [44] A. Yes.

Q. Did you ever follow the water in there to determine whether the water ran to point of service? A. I did not.

Q. Did anybody?

A. I believe Frank Kuka the ditch rider.

Q. And you can testify there was actually water at that last point two?

A. No, I can't personally testify to that.

Q. You are only basing if on the fact there was a ditch there?

A. The ditches were built to it.

Q. Now what have you to say to the ditch terminating with No. 1? A. No. 1 was in.

Q. There was water to that point?

A. To that point.

Q. Have you ever seen water at that point?

A. No; the ditch went to that point.

Q. Can you indicate on that ditch line terminating at No. 1 the furthest point approximately that

(Testimony of Paul G. Anspach.)

you have seen water in your experience as project engineer? A. No, I can't.

Q. You don't know? A. No. [45]

Q. Now, Mr. Anspach, may I ask you if you have seen water in any of the ditches represented on Plaintiff's Exhibit 1?

A. From the boundaries of it, yes.

Q. From the boundaries?

A. That is from the ditches shown on this Exhibit 1 I have seen water in lots of those ditches but I can't tell you which one or at which time.

Q. And you don't know how far or how close to the plaintiff's leased land this water was located that you saw? A. No, sir.

Q. Now on this map there is shown a lateral K, can you say at what point on that lateral that you have seen water in your experience?

A. I can't tell you.

Q. You don't know that? A. No.

Q. Would Mr. Kuka know that?

A. Mr. Kuka would know that.

Q. Now you have testified that the ditch terminating at point 2 was placed there in 41?

A. It was there in 41.

Q. It was there and on what do you base that, a personal observation or on the basis of this map?

A. No, on the basis of official project map; this is [46] not an official project map.

Q. And you base that therefore on the project map? A. That is right.

(Testimony of Paul G. Anspach.)

Q. And that is not yet in evidence, is that correct? A. Yes.

Q. Then so far as your testimony has been to this point it is merely guess work on your part as to the terminus point of these various ditches?

A. On this particular map.

Q. You are basing it only on this Exhibit No. 1?

A. That is right?

Q. And you didn't personally go over the land to determine the terminus points of these ditches, did you? A. No.

Q. Now do you know whether during the term of the defendant's leases, do you know what term those leases were for?

A. They were five year terms starting in 44 and one in 46.

Q. Do you know whether during that 7 years both leases were in operation of any water was in these ditches that you have been testifying about?

A. I don't know how far they were out in the ditches, no, I can't tell you that.

Q. You know there was water in the ditches?

A. There was water in the ditches.

Q. Isn't it part of your job to inspect these ditches? A. No, not necessarily.

Q. What is your job then?

A. My job is to supervise the entire project; there is a crew on each unit which inspects the ditches and maintains the ditches.

Q. Now in your supervision of the project do you ever ride these ditches?

(Testimony of Paul G. Anspach.)

A. What do you mean? I have inspected ditches, yes.

Q. Did you determine whether or not they would hold water?

A. Yes, and I have determined what ditches should be cleaned for a certain season.

Q. Does your office keep a record of the repairs and the ditches when they are dug?

A. Not as far as date is concerned.

Q. Not as far as date?

A. I don't have no definite record, no.

Q. Then you have no record showing the date or dates these ditches were put in as shown by Exhibit 1? A. No.

Q. And you have no record to show what date or dates new ditches are installed?

A. No, the only record would be the engineering survey record. [48]

Q. How often are these ditches repaired?

A. Whenever it is necessary.

Q. And who determines whether it is necessary?

A. The watermaster and his ditch riders.

Q. That is not in your presence then?

A. Not necessarily.

Q. Do you know whether the defendant, Mr. Aiken, has demanded any water during the terms of these leases?

A. Mr. Aiken did not demand water during the terms of these leases.

Q. But in your opinion it was possible to irrigate all of the land involved in these leases?

(Testimony of Paul G. Anspach.)

A. The land that is involved there that is irrigable.

Q. In other words, the land represented by the green shading is susceptible of irrigation?

A. Not all of it.

Q. About what portion is not susceptible?

A. Well I would have to figure up the total area of the tracts. This irrigation schedule Exhibit 2 shows the acreage in each tract, each 40 acre tract the amount of acreage in that tract that is irrigable.

Q. Who determined whether or not the acreage was irrigable?

A. There was a survey of the entire project made in 31 and 32 and set up a designation of every tract within the [49] boundary of the project as to its irrigability and also as to the amount gone out of each tract.

Q. Was that based upon your personal observation?

A. No, that was based upon two survey parties and land designation board setup by the Interior Department.

Q. You had nothing to do with that survey?

A. Nothing to do.

Q. From your examination of Plaintiff's Exhibit 2 can you tell us about what portion in percentage of the ground is not susceptible to irrigation, just an estimate? Would you like to refer to this map to assist you?

A. Well there is about 739 acres in the area.

(Testimony of Paul G. Anspach.)

I believe this is about 10 or more acres over in the 40.

Q. Total acreage?

A. About 730 acres and 605 acres irrigable of it.

Q. Are you any judge whether land is irrigable or not? A. I think so.

Q. Now will you tell the court what in your opinion makes for irrigable land?

A. Land that can be served under a gravity, in this case gravity system where water will flow from a ditch over the land with suitable distribution ditches.

Q. In other words, you submerse the entire area with water?

A. No, I said spread it over. [50]

Q. Spread it over?

A. No, the land is sloped so that it percolates through if it isn't put on in numerous places.

Q. Now do you know the general contour of the land involved here?

A. No, it is too variable.

Q. Is that what you would say is level land in your estimation?

A. No, this land here is inclined to have a pretty good slope to it.

Q. There is a decided slope?

A. There is a slope to the gullys both ways.

Q. And there is a large gully running through this land, is that true? A. Yes.

Q. Now would that have any effect on the irrigability of the land?

(Testimony of Paul G. Anspach.)

A. Certainly; that would be eliminated if it was too steep to hold water.

Q. Now do you know anything about the type soil that is involved on this land?

A. Yes, I know it is very heavy soil.

Q. Very good soil? A. Very heavy soil.

Q. And in your opinion heavy soil is susceptible of [51] irrigation? A. That is right.

Q. And better crops can be raised on heavy irrigated soil than a lighter soil?

A. It is according to who farms it.

Q. Pardon me.

A. It depends on the farmer.

Q. I am trying to get your opinion what you base the irrigable land on?

A. From past records the land irrigated on this particular unit on the Blackfeet Project produced on the average more than land not irrigated.

Q. Now when was the last time that you recall water was used on this land?

A. I don't know.

Q. Was it ever used?

A. I believe according to the ditch riders it was during the term the water users were operating the project.

Q. When was that? A. From 33 to 38.

Q. 33 to 38? A. Five seasons.

Q. And you say then this land was irrigable?

A. It was.

Q. What about after 38? [52]

A. In what respect?

(Testimony of Paul G. Anspach.)

Q. Well why didn't they irrigate after 38 if these crops were raised as you testified to?

A. That was their option.

Q. Pardon? A. That was in their option.

Q. Whose option, the lessee?

A. We couldn't force them to irrigate if they didn't want to.

Q. Well were water charges assessed prior to the time Mr. Aiken had his lease?

A. I don't know whether that land was leased prior to that time. I don't recall who had the land prior to that time.

Q. Do you recall Mr. Aiken leasing this land for the five years immediately preceding 44?

A. No, I don't.

Q. You don't recall that? A. No.

Q. Are you generally aware who is leasing that land?

A. Well I think Mr. Wielswane had it prior to Mr. Aiken but I don't recall when his lease terminated and Mr. Aiken took over.

Q. What I am getting at, Mr. Anspach, why this was assessed, that is water service commencing in 44 and then assess any charges prior to that to Mr. Aiken? [53]

A. Well I don't know that they did not.

Q. You don't know that they didn't assess them?

A. That they did not, no.

Q. Were you acquainted with Mr. Carrs about 1939?

A. Yes.

Q. What was his official capacity?

(Testimony of Paul G. Anspach.)

A. Land agent or land clerk, lease clerk.

Q. Is he living at the present time?

A. I believe some place. I don't know. He is retired back east some place.

Q. Who took his place?

A. I think Stanley R. Pugh.

Q. Are you acquainted with the party that leased this land after Mr. Aiken's lease ran out?

A. Well I believe I was gone when Mr. Aiken's lease ran out.

Q. Let's see, you were there until '50, were you not? A. 50.

Q. Are you acquainted with Mr. Henneman who leased this land in '49?

A. I am acquainted with Mr. Henneman. I have no record of his lease in '49.

Q. When was the last time you looked over this land? A. I couldn't tell you that.

Q. Well was it 10 years ago or 15 years ago?

A. Well it probably was 15 years ago anyhow.

Q. You haven't been over this land for approximately 15 years then?

A. Not to my knowledge.

Q. In other words, since approximately '40 you have not physically been over this land?

A. Not to my knowledge; I couldn't swear to it.

Q. And since '40 you don't know what's happened in regard to the ditches, do you, outside of the records you testified to?

A. And the records to me coming in from the watermaster office on the unit.

(Testimony of Paul G. Anspach.)

Q. Now did you testify on direct examination that you determined the acres susceptible to irrigation? I didn't understand that?

A. No, I didn't determine the acreage. We simply setup the schedule of the irrigable acreage from the land designation board determination. The land board setup by the Interior Department determined the irrigable acres on each unit and we in turn set it up in the schedule of these individual leases as they come to our attention.

Q. Yes, and this amount of acreage irrigable would that mean from the basis of the contour map such as is in evidence here?

A. The contour map and projected lands, surveyed lands. [55]

Q. In other words, you can determine from the project map whether land can be irrigated by a certain system of ditches? A. That is right.

Q. Now referring again to Plaintiff's Exhibit 1 I will ask you if between your numbers on your terminus points 1 and 2 there is a gully?

A. Yes.

Q. And is that a steep gully or is that a gradual slope?

A. I would presume from the width of it it is a steep gully.

Q. And does the land slope towards that gully on either side?

A. The contours would indicate.

Q. Now referring to your point 1 immediately to

(Testimony of Paul G. Anspach.)

the right of that point approximately how far does it show this gully in distance?

A. To the north the gully is about an eighth of a mile, the center of the gully would be about an eighth of a mile.

Q. I am referring to the slope. And southeasterly direction from point 1, is that a graduated slope towards the gully?

A. That topography is not too large a scale to tell but the general run on that one it would be a graduated slope [56] down to the gulley.

Q. Graduated slope. Now referring to the terminus point 2 which you have indicated preceding in a southwesterly direction from that point will you indicate what type of slope toward the gulley toward the north of that there is?

A. Well that should be according to the topography a graduated slope to the northwest.

Q. And would you say the ditches run to point 2 terminus runs alongside of a hill?

A. No, it runs along a ridge.

Q. Along a ridge? A. Yes.

Q. And would it surprise you to know if water was in that ditch that the water would run to the gulley instead of on to the land it was supposed to irrigate?

A. It wouldn't surprise me very much.

Q. It is a possibility?

A. If there is a fill in there and it isn't maintained, it would run over.

Q. But you don't know whether there is?

(Testimony of Paul G. Anspach.)

A. I don't know.

Q. Now I am referring to Plaintiff's Exhibit 4, you have testified that that is a memo sent to Mr. Robert Aiken?

A. That is the office copy of a statement or memo.

Q. It isn't an official bill, it is a memo statement bill [57] for what?

A. Of unpaid irrigation charges.

Q. Where does it show on that exhibit anything to the effect that is an unpaid irrigation charge?

A. Well that is the carbon copy and it hasn't the typed form; it is the office retained copy on a thin sheet, and I believe the forms are in some of the files here.

Q. You don't know though?

A. I do know.

Q. This exhibit itself does not indicate what those charges were made for or that they were even charged, does it?

A. It does not specify on this office retained copy.

Q. Does it indicate Mr. Aiken owes any amount of money there? A. Not on this copy.

Q. They are just some figures appearing?

A. That is right.

Q. Now isn't it a fact, Mr. Aiken wrote to your office after he received that requesting information what those charges were?

A. I can't recall that.

Q. You don't recall that letter?

(Testimony of Paul G. Anspach.)

A. I don't recall.

Q. Could it have been received?

A. It could have. [58]

Q. Would it be in your official files?

A. If it was received.

Q. Could it be in the files produced in court this morning?

A. I couldn't say.

Q. Are those the official files kept in your office?

A. That Mr. Stout brought up is official files.

Q. And those were the files maintained under your supervision when you were in the office there?

A. Yes.

Q. And does that file contain everything that pertains to these leases in question? I am referring now to all correspondence.

A. All correspondence should be in the individual file.

Q. And if Mr. Aiken wrote to you that would be in that file?

A. It should be in the file.

Q. May I see that file. I am handing you what was formerly identified by you as the official file in your office as pertains to Robert Aiken?

A. I didn't identify this as official file because this was made up after I left there and I don't know whether it was the official file or not.

Q. Did you keep an official file when you were the supervisor?

A. Yes. [59]

Q. And is that file here? Do you recognize any of the documents in the file in which you have in your hand?

(Testimony of Paul G. Anspach.)

A. These documents are all subsequent to my leaving the project.

Q. They are? A. Yes.

Q. I see a letter dated January 2, 1948, you were in the office at that time?

A. I was in the office at that time but that, when this file copy was sent to the district office this information was typed on to this standard form in order to retain a record in the project in the event of its being lost.

Mr. Cyr: That is a document January 2, 1948?

A. Yes, but that was in order to send to the district office a copy of all office retained copies in the present files and it isn't the original document here. The rest of these are all——

Q. Filed in which office?

A. With the district office.

Q. You don't show any response to that reply from Mr. Aiken in the file?

A. No, not in that file.

Mr. Cyr: In that regard let the record show we have delivered to the counsel for the defendant all of the files with the project which we have in your possession [60] in our possession containing correspondence with Mr. Aiken.

The Court: I think we had better suspend here.

(12:15 a.m. January 18, 1952, to resume at 2:00 p.m.) [61]

Court resumed, pursuant to adjournment, at 2:00 o'clock p.m., on January 18, 1956, at which time all counsel and parties were present.

The Court: Any further examination, Mr. Wuerthner?

Mr. Wuerthner: Yes, your Honor.

PAUL G. ANSPACH

resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Wuerthner): Now, Mr. Anspach, I may have asked you this question this morning, I am not sure. Handing you Plaintiff's Exhibits 2 and 3 I will ask you whether those charges were assessed or made by you direct or under your supervision? A. That is right, they were.

Q. And this is directly under the control of your department?

A. The irrigation district is, right.

Q. And you sent Plaintiff's Exhibit 4 to the defendant, is that correct? A. That is correct.

Q. You either sent it or caused it to be sent?

A. That is right it was prepared in the irrigation office and went through the regular routine for mailing.

Q. But your job of project engineer requires you to [62] assess the irrigation charges?

A. That is right.

Q. And you did so? A. I did so.

Q. Now, Mr. Anspach, I will ask you where your authority came from to assess these water charges, these irrigation charges?

A. The authority is contained in a directive to the land division; it is a part of the lease contract.

(Testimony of Paul G. Anspach.)

Q. Was it made a part of the lease contract?

A. Made part of the lease contract.

Q. Do you have the original lease?

Mr. Wuerthner: Do you have copies, Mr. Cyr?

Mr. Cyr: I don't know whether or not there are better copies which are attached to the complaint, the copies attached to the complaint are true copies and admitted in the pleadings.

Mr. Wuerthner: Your Honor, we—is it necessary to introduce the files of the case in order to use a portion thereof?

The Court: It is often done, whatever pleading is used it is often introduced and marked but it is really a part of the case and I have never thought it necessary to do so.

Mr. Wuerthner: Very well. [63]

Q. (By Mr. Wuerthner): Mr. Anspach, I am handing you the Government's complaint in this matter and specifically referring you to Exhibit C, which is the 44 farming and grazing lease, and also Exhibit D, which is a 46 farming and grazing lease, and ask you to examine those leases and determine whether or not, where your authority came from to assess these operation and maintenance charges? You have said they were contained in a directive which was made a part of the lease, will you show us that directive in the lease?

The Court: Does counsel know of any particular place where it can be found? It might save him a lot of reading and save us some time.

(Testimony of Paul G. Anspach.)

Mr. Cyr: It is at the bottom of the first page, last line.

Mr. Wuerthner: Will you show the witness where you are referring, Mr. Cyr?

Mr. Cyr: Your Honor, this is the notice which is in question for which we have asked reformation on the basis of the pleadings; it does not appear in this lease and we will object to this.

The Court: And has it any reference to the question propounded by Mr. Wuerthner, in the notice that has any bearing on it?

Mr. Cyr: No, it is not there and for the record we object because it lacks materiality because it is not [64] necessary it be in the lease; it is a matter of law.

The Court: He can ask if there is anything in there in reference to that subject?

Mr. Cyr: Yes, but he is asking by what authority he assessed this property and it isn't by virtue of the lease or anything else, it is by virtue of law.

Mr. Wuerthner: Well the United States Attorney then admits there is no authority in the 44 lease for the witness to assess these O & M charges?

Mr. Cyr: Your Honor, I am not on the stand and I am not under oath and he can't prove it. I don't know.

Q. (By Mr. Wuerthner): Then your answer is, Mr. Anspach, that it is not contained in this lease, Exhibit C?

A. With the exception of one reference, "If it is shown to be necessary to practice weed eradica-

(Testimony of Paul G. Anspach.)

tion for one year only out of 5, water charges will not be required for that year if water is not used."

Q. And that is your reference?

A. That is the only reference in this particular lease.

Q. And what you have just testified to was your sole authority for assessing O & M charges on the basis of the '44 lease?

A. Our authority is a directive from the Interior Department, which is a matter of law, I believe. [65]

Q. Yes, and that directive was then made a part of this lease? A. I wouldn't know that.

Q. You don't know whether the defendant knew anything of this directive?

A. Not in the lease proper I wouldn't know; I believe the advertisement expressed it.

Q. And did you inform the defendant of this advertisement which you testified to?

A. No, that would come from the agency office proper.

Q. In other words, you were attempting to assess O & M charges on the directive which is not contained in this lease between the Government and Mr. Aiken?

A. In the lease proper I would say yes.

Q. Now, Mr. Anspach, referring to Plaintiff's Exhibit 1 and the portion that is colored in red, you note that portion of that map? A. Yes.

Q. Now do I understand your testimony to be that a part of the portion colored in red is not

(Testimony of Paul G. Anspach.)

susceptible to irrigation? A. That is right.

Q. And approximately what part of that portion is not susceptible percentagewise?

A. Well I would have to look at the schedule because [66] I can't recall, I can't recall the individual tracts. I believe Exhibit 3 gives the exact acreage on each unit.

Q. Well referring you to Plaintiff's Exhibit 3 can you tell us approximately what percentage of the area colored in red is not susceptible to irrigation?

A. Well it is practically 100 acres out of the 240; no, it is 62 acres out of 200 acres.

Q. That cannot be irrigated?

A. That cannot be irrigated.

Q. That is a little more than a third of the area, a little less than a third of that area cannot be irrigated? A. That is right.

Q. Now referring again to Plaintiff's Exhibit 1 will you please point out to the court the closest irrigation ditch to that area in red?

A. Here is the irrigation ditch right here.

Q. And that is the ditch found in section 30, is it not? A. That is right.

Q. And where is the main part of the red portion located?

A. In section 29 and 30.

Q. Now approximately how far from the closer boundary of the red colored portion does that map show the terminus of an irrigation ditch?

(Testimony of Paul G. Anspach.)

A. Diagonally across the 40 acres tract would be some place around 2,000 feet. [67]

Q. In terms of miles about what would that be?

A. About half a mile, between a quarter and half a mile.

Q. How is it then, Mr. Anspach, that you or your office is attempting to charge the defendant with O & M charges when the ditch only runs to approximately one-half mile to the closest portion of the land covered by that area?

A. The regulation that we operate under is that water delivered to a farm unit or allotment, a farm unit is the land that is under control of one and we deliver water to that land and it is up to him to distribute that water over the several acres of his holdings.

Q. Under the belief it was feasible for Mr. Aiken to distribute water from the terminus of No. 4?

A. Distribute directly on to his leased land.

Q. It would be approximately one-half mile from the terminus No. 3 to the closest point of the land covered by the red coloring?

A. Less than half a mile.

Q. And that would be according to your interpretation up to the operation of the defendant?

A. Very definitely.

Q. How close do you have to run to a *termi* to the land in order to come within the regulation?

A. We deliver just to the borders of the land.

Q. Do you conduct it to the border of the land covered [68] by the separate leases?

(Testimony of Paul G. Anspach.)

A. Not by the separate lease but by the landholder, the operator.

Q. And if the lease land runs in a long parallel line and you deliver to the, we will say to the westernmost portion, then it is up to the land owner to get the water to the eastern portion regardless of the distance?

A. Very definitely. The regulations specifically call for delivery to an allotment on the farm unit.

Q. Now what regulations are you referring to?

A. Referring to the rules and regulations submitted to us by the Interior Department.

Q. And do you make those regulations public?

A. Why certainly they are public.

Q. Do you make them available to your lease holders? A. I believe the——

Mr. Cyr: Your Honor, we are going to object to this line of questioning, the court knows the code federal regulations have the effect of law when published; counsel is an attorney and he knows these are all regulations which have been published or should know they are matters of law to be determined by the court; the question is argumentative.

The Court: Well it is to a certain extent, yes, but he is looking for information as to what they did and whether the regulations were brought to the attention of the defendant, [69] and I think maybe you have gone far enough along that line but it is proper to make an inquiry what was done and what information was imparted to the defend-

(Testimony of Paul G. Anspach.)

ant at the time these leases were issued. All right, go ahead.

Mr. Wuerthner: Read the last question.

(The last question was read.)

Q. Did you make them available to your leaseholders?

A. When they first came out they were sent to every user of land on the irrigation project and I wouldn't say that every water user that came on to the project, every little water user that came on to the property afterwards was supplied a copy, but they were available and had been when originally sent to us and distributed throughout the area.

Q. And I believe your testimony is that these regulations become a part of the leases?

A. No, they are a part of the irrigation operation rules and regulations.

Q. But they are not a part of the leases involved?

A. They are two separate transactions entirely.

Q. Now, Mr. Anspach, handing you Defendant's Exhibit 5 I will ask whether or not you can identify it? A. Yes.

Q. Will you identify it?

A. That is a statement of the unpaid irrigation charges [70] by years by leases sent out to each individual lessee on the project who had any delinquent charges and that is the copies that was sent to Mr. Aiken in October, 1950.

Q. Now was that sent under your direction and supervision?

(Testimony of Paul G. Anspach.)

A. Not in October, 1950; I left in August, 1950.

Q. Who was there at that time?

A. Mr. Stout.

Q. Is this the general form sent out from your office?

A. That is the general form that was sent out.

Q. Now referring to Plaintiff's Exhibit 4 I will ask you to tell the court the reason for the additional charges assessed in 47 as compared with 45 and 46, if you know?

A. In 45 and 46 it included the one lease which we called the 44 to 48 lease; in 47 he had made the 46 to 50 lease and he hadn't paid on that, and that was added to the delinquent charges for the previous lease. It specifically shows two different leases.

Q. Now what is the policy of your office in collecting these water charges, do you collect them at the end of the season or when?

A. They are, according to regulations they are due in advance; if not paid in advance, then they are notified at that time. I believe it was the 31st of October that they were due and after that they were subject to a penalty and [71] in October it was our policy to notify everybody who had delinquent charges for that year or any previous years.

Q. Now I believe you were project engineer in 44 when Mr. Aiken entered into this lease with the Government, were you not? A. I was.

Q. And at that time were the water charges

(Testimony of Paul G. Anspach.)

payable in advance? A. They were.

Q. Were they collected in advance?

A. They were not.

Q. Why not?

A. They were; in case the farmer used water he had to pay in advance if he wanted to use water and if he determined not to use water, there was no way we could force him to pay it in advance. According to the rental regulation they were payable as of October 31, the latest regulations.

Q. For '44 do you mean?

A. No, that was a regulation prior to, I believe, about 33 it was set up as a due date that a penalty applied thereafter.

Q. So that in October following the first year of the lease the water charges were payable by Mr. Aiken? A. Yes.

Q. And you didn't collect them? [72]

A. No.

Q. Why didn't you? Did you collect any during that year? A. He didn't pay it.

Q. Did you attempt to forfeit his lease?

A. No.

Q. Didn't you have that right?

A. No, I had no right to do that; that was the province of the agency land department; the collection of the irrigation charges was also in their department.

Q. The assessment was in your department?

A. Yes, sir.

Q. And the collection was in whose department?

(Testimony of Paul G. Anspach.)

A. The land department of the agency.

Q. And who was in charge of that department at that time?

A. I am not sure whether Mr. Power was there then or whether it was Mr. Cross. Mr. Cross was there ahead of Mr. Power and I don't recall when they transferred.

Q. Do you recall having any discussion with Mr. Aiken with regard to the assessment of these water charges?

A. No.

Q. You at no time discussed it with him?

A. Not that I recall.

Q. Prior to his entering into the lease?

A. No, not that I recall. I may but I don't recall it because there are many of them come in and I can't recall [73] individual cases.

Q. Now in order to get the record straight as far as your testimony is concerned is your testimony to the effect that if the user did not take water during a season that he was liable to pay for the water whether he used it or not?

A. Very definitely.

Q. Now do you know what regulation has that requirement?

A. Well I can't stipulate the regulation but I believe it is of record in the files here.

Q. You don't know offhand?

A. No.

Q. Could you find it if the files were given to you to look over?

A. I don't know whether I could find it myself personally, no.

(Testimony of Paul G. Anspach.)

Mr. Cyr: I will hand the witness the complaint with the assessment attached in the case referring to the bottom of the fourth paragraph.

Q. What are you referring to now, Mr. Anspach? A. Well, it is——

Q. Are you referring to the sale of farming and grazing leases as shown by Exhibit A of the complaint, that is the advertisement for these leases? A. Yes.

Q. Now what are you referring to therein?

A. Well I presume, it says: "Where summer fallow is——

Q. Just a minute. You are now reading from about the middle of paragraph 4?

A. Paragraph 4: "Where summer fallow is practiced it will be necessary for cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigation area is to lie fallow during the winter months."

"In the irrigable area, at least one of the 5 must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summer fallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of 5."

Q. Now that paragraph refers to the irrigable area, is that correct?

A. That is irrigable area.

Q. Now referring to this paragraph 3 of that same exhibit will you kindly read that?

(Testimony of Paul G. Anspach.)

A. "Where water for irrigation is available, lands generally may be farmed and bids will be considered on a farming basis on sod land, including those listed herein as grazing; provided, of course, the soil is what might be expected to be productive."

Q. Now it is your contention water was available to irrigate the entire tracts of land in both leases? [75] A. No, I never said that.

Q. Well subject to the some 60 acres elimination? A. That were non-irrigable.

Q. And the rest of it was subject to irrigation?

A. Subject to irrigation.

The Court: The landowner had to operate his own water laterals?

A. Assuming the water reached his place.

Q. (By Mr. Wuerthner): Now I call your attention to the last two sentences in paragraph 2 thereof?

A. "Land in the dry land areas must be farmed by the strip method and any new dry land broken must be stripped the third year and thereafter."

Q. Now can you indicate where the dry land area is by that map?

A. Not by that map because it isn't designated by topography and the designation of the land is not on that map.

Q. Just because there are irrigation ditches on this map then it is your contention the land is subject to irrigation?

(Testimony of Paul G. Anspach.)

A. That is right, there is distribution to the land and water can be delivered to the land.

Q. Now do you know how the land was farmed in that area during the years Mr. Aiken held it?

A. No.

Q. You were never out on the land?

A. I might have been when I was out there I wasn't paying attention to boundaries; I do not know which land was which.

Q. How is land generally farmed out there during that period, would it be summer fallowing or strip farming?

A. Part of it would be summer fallow and part of it was strip farmed. Where the water could not be delivered they are all strip farms according to the lease stipulation but for me to try to remember a particular tract of land I can't do it.

Q. Now referring to the years that you have testified to here irrigation water was used on this land you said, I believe it was back in 33, the last time water was used to irrigate the land in question?

A. I didn't specify what year it was because I don't know.

Q. Do you have any idea the last year irrigation was practiced on this land?

A. On this particular tract of land?

Q. Yes.

A. I don't know whether it was ever practiced on this particular tract of land.

(Testimony of Paul G. Anspach.)

Q. Do you recall when a portion of this land was broken? [77] A. No.

Q. Isn't it a fact that after the land is first broken it is not susceptible to irrigation, then later on the soil is heavier?

A. No, I don't know that it is.

Q. Do you know whether or not any erosion went on in this area we are discussing during the years of the lease in question?

A. Wind erosion or water erosion?

Q. Yes, both?

A. There was lots of wind erosion all over the whole project; it was our big problem to keep the erosion out of our ditches.

Q. What did you do to stop the erosion during that time? A. We did nothing.

Q. What did you suggest?

A. Well we didn't suggest because we were—we were not in control of the farming operations.

Q. Do you know what stops erosion?

A. Cover crop will stop erosion or rough summer fallow will stop erosion.

Q. Summer fallowing stops erosion?

A. Summer fallow.

Q. Isn't it a fact that the best way to stop erosion is strip farming, a method which has been practiced in this [78] area for many years?

A. On dry land, yes.

Mr. Julius Wuerthner: Your Honor, we don't ordinarily like to make any objection of this kind but this witness is making different motions that

(Testimony of Paul G. Anspach.)

my partner doesn't see and might we ask that he be requested to sit over here and not make any motions; he just did that on the question about erosion, your Honor?

Mr. Harlow Pease: Are you saying I gave the witness any signals, sir?

Mr. Julius Wuerthner: I request, your Honor, that——

Mr. Harlow Pease: I request, your Honor, that I be permitted to sit where I can hear what the witness says. The counsel speaks in a loud voice and the witness in a low voice and I have difficulty hearing. I deny I have done anything counsel suggests.

Mr. Julius Wuerthner: There is a seat here.

Mr. Harlow Pease: I will not take dictation from counsel. I will ask your Honor——

The Court: I have known Mr. Pease for a good many years and I don't think he would make any signals to the witness or try to do anything of the sort; he was Assistant United States Attorney for a good many years and handled cases before me in Butte, Missoula and around and I can't listen to any such charge as that. [79]

Mr. Wuerthner: We would just ask the court to admonish him he not use any because I observed him and the court probably didn't.

The Court: Well you might have thought that was it and you might have been wrong in so thinking; but I have known him too long to have something like that sprung on him. Proceed.

(Testimony of Paul G. Anspach.)

Q. (By Mr. John Wuerthner): Now you are referring again to Exhibit A of the complaint and specifically referring you to a description of the various allotments are you acquainted with the description of those allotments?

A. Not as allotments, no.

Q. Well is that the general way in which the allotments are put out for bid? A. Yes.

Q. And is that the manner in which they are followed?

A. That is the manner in which they are followed in the irrigation section; we pay no attention to the names; its land description only that we refer to except in the water users ledger and that is in the water users ledger the landowner's name is posted in the water users ledger, but as far as using the allotment numbers and names we don't because our records are all strictly by land descriptions.

Q. Now referring you to the furthest righthand column [80] there where it is under the heading of "use," I note there that it is broken down as farming and grazing land, is that correct?

A. Yes.

Q. Now is that the general way in which you describe the use of the land in the various invitations for bids?

A. We don't make the invitations for bids. They are made up in the land office and all we do is at their request we give them the irrigable acreage of the individual tracts. They make all the invita-

(Testimony of Paul G. Anspach.)

tions. They make all the advertisements. Our records are made simply from a completed bid or completed lease and after the lease is completed we are furnished with a copy and then our records are set up in accordance with the terms of the lease as made.

Q. And the lease is based upon the terms contained therein? Now I am referring again to the general lease.

A. Well that isn't the way it comes to us. Now as far as we are concerned this farming land might be dry farm land and it might not be subject to irrigation at all.

Q. Now I noticed this bid was dated February 1st, 1944, were you superintendent at that time or the project engineer?

A. I was project engineer.

Q. And at that time you were familiar with the way they use to put out their land on bid?

A. Yes. [81]

Q. How did it happen there is nothing mentioned there with regard to irrigable and non-irrigable land, is that an oversight on somebody's part that year?

A. I don't know why it was put out in that particular form.

Q. How is it usually put out?

Mr. Cyr: Your Honor, we will object to the question and the whole line of questioning on the ground this witness says he does not know anything

(Testimony of Paul G. Anspach.)

about this; it is argumentative, immaterial and incompetent as to this witness.

Mr. Wuerthner: I believe he testified, your Honor, these bids come out and it is specified in a column whether irrigable or non-irrigable land.

Q. You know about that, do you not?

A. I didn't say specified in the column in the advertisement. It is specified as I recall that certain lands are irrigable and will be subject to the irrigation charge.

Q. Isn't this an exact copy of the advertisement? A. I don't know.

Q. I will tell you for your information this is an exact copy of the advertisement for bids which is a part of the Government's complaint?

A. Yes.

Q. In other words, that is the way the bids appeared at that time? [82]

A. Those were put out for bids. Now farmers will bid on that so much for farming land, so much for grazing, so much for dry farming land and so much for irrigated farming land.

Q. But you can't explain at this time why the farming land was not broken down as to whether it is irrigable or non-irrigable land?

A. No, I can't explain that.

Q. Now handing you Defendant's proposed Exhibit 6 I will ask you if you can identify that?

A. No, I can't identify it. It isn't any of my records. It originated in the agency land division.

(Testimony of Paul G. Anspach.)

Q. You had nothing to do with that?

A. Nothing to do with it whatever.

Mr. Pease: Would you show what document was incorporated in that question?

Mr. Cyr: Mr. Wuerthner, I believe the record does not disclose what you were referring to in that last question propounded to the witness.

Mr. Wuerthner: Very well.

Q. Handing you Defendant's Exhibit 6——

Mr. Wuerthner: Do you want me to identify it to him so the record will show?

Mr. Cyr: It wasn't identified by number.

Mr. Wuerthner: Defendant's Exhibit 6, which the witness does not identify.

Mr. Wuerthner: I think that is all. [83]

Redirect Examination

Q. (By Mr. Cyr): I believe you testified on cross examination, Mr. Anspach, that you had inserted the terminus points of the ditch marked on Plaintiff's Exhibit 1 from the location of this ditch on a project map, is that correct?

A. That is right.

Q. I will hand you what has been marked as Plaintiff's Exhibit 7 and ask you if you can identify that, please? A. The map?

Q. Yes, what is it?

A. That is a print of the regular project map, the official land description, designation maps.

Q. And were these maps prepared under your direction and supervision?

(Testimony of Paul G. Anspach.)

A. No, they were prepared under a special survey that was setup for the purpose of land designation. I act only as in a supervisor capacity on particular things that might come up.

Q. And do you know of your own knowledge as to the, from records of the office and from your position as the project engineer the location of the various items which are designated on this map?

A. I do. [84]

Q. And do you know from your own experience and from your knowledge as project engineer that the places where the ditches are located on that map are accurate? As of the date the map was made?

A. They are.

Q. And do you know when that was done, sir?

A. This map was made in 31 and 32; it was made in my office by outside surveying crew.

Q. Now does this map contain the lands which are here in question?

A. It does.

Q. And referring to that, does that from your own knowledge and experience as project engineer show the location of the terminus of the ditches on the lands in question at that time?

A. It does with two exceptions; at the time this map was made there were two lateral extensions that were made subsequent that were not made at the time this map was revised in 41.

Q. Does this show the location and terminus of the ditches at the time Mr. Aiken leased the land?

A. With the two exceptions.

Q. Now by that the two exceptions are you ex-

(Testimony of Paul G. Anspach.)

plaining that—will you explain that a little further? I don't understand. [85]

A. There is only one in question. There is one ditch here, No. 3.

Mr. Wuerthner: Just a minute. Your Honor, before there is any testimony with regard to this exhibit we ask it first be offered in evidence so we may put our objection in if we have one.

The Court: These are for the identification?

Mr. Cyr: These are further identification.

The Court: Yes, it is explanatory and identifying but before going into any question of fact in respect to it it should be shown to counsel on the other side first.

Mr. Cyr: Would counsel care to come up so we can see what we are referring to here.

Q. You were saying, Mr. Anspach?

A. You want Exhibit 1, termed as No. 1; That ditch shows it is in a position that it carried even beyond that point there and this ditch No. 2 on the exhibit is there. This ditch was subsequently put in. It didn't affect Mr. Aiken's lease. It was some land that was not leased by him. And No. 4 was definitely in at the time the revision of this map was made in 41.

Q. Now I will hand you a red pencil if you will step down just for a moment and would you mark on this map the same ditches which appear on Plaintiff's Exhibit No. 1 as you have marked their terminus? [86]

A. This is the terminus of this ditch here.

(Testimony of Paul G. Anspach.)

Q. You have marked that No. 1 to correspond with No. 1 on Plaintiff's Exhibit?

A. This is No. 2.

Q. You are writing on the scotch tape; it was right next to the scotch tape?

A. No, No. 3 was put in subsequent to this; it didn't affect the land leased by Mr. Aiken, and here was the terminus of No. 4.

Q. Do I understand No. 3 does not appear on this map?

A. Here is No. 3; it appears as proposed ditch in 41; when this map was made; it had not been completed.

Q. But ditches 1, 2 and 4 had been completed?

A. Yes.

Q. And you knew that of your own knowledge?

A. I knew it.

Q. And this map accurately portrays the location of those ditches on this map?

A. That is right.

Mr. Cyr: We offer in evidence Plaintiff's Exhibit No. 7.

The Court: Any objection?

Mr. Wuerthner: Your Honor, may I interrogate the witness?

The Court: Yes, you may. [87]

Q. (By Mr. Wuerthner): Mr. Anspach, you testified this was revised in 41?

A. That is right.

Q. Where does the 41 revision appear on this?

A. It does not appear.

(Testimony of Paul G. Anspach.)

Q. How do you know then?

A. I know it because Mr. Alex L. Heath, Assistant Engineer for me at the time, made those revisions in the winter of 41 and 40 and he was transferred from the project in 41 and there has been no revision made of those maps since.

Q. Where is that gentleman at the present time?

A. I would not know; he is in the Government service.

Q. There is nothing appears on this map to show the 41 revision of it? A. No.

Q. So far as this map it is on the face this is a 31 map? A. 31 map, that is right.

Mr. Wuerthner: What is the purpose of offering this in evidence, in corroboration of this map?

Mr. Cyr: That is to establish the terminus of the ditches. You on cross examination questioned him as to the reason he located the terminus of the ditches at the places that he did and we want to show it was by this map. [88]

Mr. Wuerthner: Well if those terminus are the same as appear on the Exhibit No. 1, we have no objection. We have no time to compare them.

Mr. Cyr: Well they are.

The Court: Under that objection it may be admitted in evidence.

Q. (By Mr. Cyr): And it was on the basis of the information you had from this map which is marked Plaintiff's Exhibit 7 that you have placed the terminus as indicated on Plaintiff's Exhibit 1?

A. As near as they show in Exhibit 1. I believe

(Testimony of Paul G. Anspach.)

that map shows if there is any further extension than Exhibit 1 shows.

Q. On which ditch is that?

A. That is on No. 1.

Q. You are referring to Plaintiff's Exhibit 7 at the time you are referring to Exhibit No. 7?

A. That is right.

Q. And the ditch numbered 1 extends about half a mile further than that on No. 1?

A. It did in 41.

Q. Now do you know whether or not there were any changes after that in those ditches, were any of them destroyed?

A. Not that I know of. There was a number of extensions [89] made to those ditches subsequent to 41 but I couldn't say which ones and what year.

Q. Do you know whether or not those same ditches were used and continued to be used as ditches for the period until you retired?

A. Yes.

Q. Now there was some question on cross examination as to the rate of assessment, now can you tell the court who fixed the rate of assessment on these?

A. The Secretary of The Interior.

Q. You have no control over that?

A. No control.

Q. Now do you know how the dry lands and irrigable lands were designated, is there anything you have which would indicate the manner in which they are designated?

(Testimony of Paul G. Anspach.)

A. They are on the maps.

Q. Yes.

A. Well, the designation survey that I referred to of 31 and 32 was a complete survey of the proposed project area and that survey, the topographic survey eliminated or depicted the high land above gravity flow and the lands that were too steep for irrigation, the steep or alkali lands were so shown on the schedule.

Q. Referring to Plaintiff's Exhibit 7, is that information shown on that map? [90]

A. Yes, by the hatching, the horizontal hatching, which has none in this particular area. Horizontal hatching depicted low or wet planes.

Q. The vertical hatching?

A. The vertical hatching was too steep for application of irrigation.

Mr. Wuerthner: May it please the court, that exhibit was introduced for the purpose of showing irrigation ditches as they existed and no other purpose; now if they are going into further matters, we will add further objections to that exhibit.

Q. (By Mr. Cyr): On this map was the surveying done with reference to these physical factors of the land while you were project engineer?

A. Yes.

Q. And was that done in part by you and under your supervision and direction?

A. No, they were done under a special survey party that were sent in to do that particular job alone.

(Testimony of Paul G. Anspach.)

Q. And did you have occasion to survey this same land within the project?

A. What do you mean by survey the same land?

Q. I believe you stated on direct examination that you surveyed this same land for the location of the ditches? [91]

A. This original survey that designated the land laid out proposed ditches to several lands that were not already under service under ditch and I think at one time to extend those laterals we went out and resurveyed those proposed laterals and staked them for the machinery construct those laterals. Now that is the survey work that I refer to that I had helped.

Q. That survey was done for the purpose of locating the ditches?

A. Rather staking the ditch for construction.

Q. And what considerations did you make in locating the place where the ditches were to be constructed?

A. Well, the gradient, water gradient, the point and grade gradient would reach; in other words, the point water would flow through a ditch.

Q. Was that based in part or in whole upon the matter gained for the survey upon which this map was prepared?

A. Yes. Once in a while we found a spot we could remedy and change but generally we followed the survey setup.

Q. So this map the actual survey work you did with reference to the location of the ditches was

(Testimony of Paul G. Anspach.)

done in order to effectuate the plan as set out in this map, is that correct? A. That is right.

Q. And you did actually survey that yourself and with men under your direction? [92]

A. I did.

Q. And as a result of that did you observe the physical factors which are set forth in this map marked Plaintiff's Exhibit 7? A. I did.

Q. And did those things as they appeared to you, those physical factors conform with the physical factors as set forth on Plaintiff's Exhibit 7?

A. They did.

Mr. Cyr: Now we wish counsel to understand this map is offered for the purpose of showing the types of lands.

Mr. Wuerthner: Just for illustration purposes?

Mr. Cyr: Well I think it goes further than that; it depicts the lands which are irrigable and non-irrigable, is that correct, Mr. Anspach?

A. That is right.

Mr. Cyr: We don't want to mislead counsel it is offered for that purpose only.

Q. (By Mr. Wuerthner): Will you point out the difference between the irrigable and non-irrigable land?

A. Any land that is within the heavy boundary which we said was the boundary of the project, any land which is hatched one way or another is not irrigable land, and one hatching depicts high land, this hatching depicts low or [93] alkali land,

(Testimony of Paul G. Anspach.)

and this hatching depicts steep that is not logical to try to irrigate.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibit 7 for the purpose of showing the irrigability or non-irrigability of the land the defendant objects on the ground and for the reason that the map was made in 31; there is nothing shown thereon to indicate that there has been a later revision so as to effect or affect the defendant, who subsequently went on the land under the lease. This is some 13 years later and there will be further testimony introduced here to show that as a result of breaking the land the contour of the land changes and the character of the land changes, and for that matter this map is too remote in time and place to show the condition of the land as it existed at the time Mr. Aiken took the lease in question.

The Court: I think it may have some applicability; I will overrule the objection and admit it in evidence. Proceed with your examination.

Mr. Cyr: Yes. Just a moment, your Honor; I may be finished.

Q. (By Mr. Cyr): With reference to what has been marked as Plaintiff's Exhibit 4 I believe you have stated that the original which was sent to Mr. Aiken had other printing on it other than the figures which appear on that copy? [94]

A. Yes, they are a mimeograph form and this is the insertion in that mimeograph form. The

(Testimony of Paul G. Anspach.)

body of the form does not show on this. This was kept simply as an office memo copy.

Q. And would a copy of that have been furnished the Indian Agency office?

A. To the land division of the Indian Agency, the Tribal Counsel and to the lessee himself.

Q. I will show you what has been marked as Plaintiff's Exhibit 8 and ask you if you can identify that with reference to Exhibit 4?

A. That is the mimeograph form that is used and the same information as in the office copy.

Q. That is in Plaintiff's Exhibit 4?

A. That is right.

Mr. Cyr: That is all.

Recross Examination

Q. (By Mr. Wuerthner): Mr. Anspach, when you testify with respect to the irrigability and the ditches that are involved in this it is based on a technical standpoint rather than a practical standpoint, isn't it?

A. I don't believe I get your question exactly.

Q. Isn't it a fact that your testimony with respect to these ditches that were on the land involved is based on a technical standpoint rather than a practical standpoint or a standpoint of use by the farmer involved?

A. Well, I don't know just from a technical point of view the land could be irrigated from the ditches.

Q. Now could it be from a practical point of view?

(Testimony of Paul G. Anspach.)

A. That would have to come from somebody else.

Q. You don't know anything about the practical aspect?

A. I am not a farmer.

Q. You are not an irrigation farmer?

A. I am not an irrigation farmer.

Q. Did you have any experience with building irrigation ditches other than on this project?

A. Not other than on this project.

Q. Do you know whether or not the ditches that were constructed do carry water?

A. I do.

Q. Do you know whether they did carry water for the areas shown that they extended in these maps in evidence?

A. They were calculated to carry the water.

Q. But from a practical standpoint?

A. From a practical standpoint they did.

Q. How do you know that?

A. They were constructed to carry what was considered a [96] headwater of 21½ second feet.

Q. But were these ditches ever practically tried out? Did you actually have water in them?

A. I can't tell you. I didn't put water in, I don't know if the man didn't irrigate and I don't know whether they were tried out clear through that land or not. I didn't operate them personally.

Q. Did you ever see water in those minor laterals you have been testifying to?

A. I can't swear that I did.

Q. Now you have testified that there have been

(Testimony of Paul G. Anspach.)

no changes in that land with respect to the irrigation system since 41, is that your testimony?

A. There has been no change in the land but there have been changes in the irrigation system.

Q. Now I believe you said this morning you haven't been on that land since '40 or so, how is it you know there are no changes in the land?

A. Well I don't know what changes there could be in the land other than the change from sod land in some cases to farm land; the topography would not change other than some erosion changes.

Q. Then your testimony in that respect is based on conjecture? A. That is right.

Mr. Wuerthner: That is all. [97]

Redirect Examination

Q. (By Mr. Cyr): About how many miles of irrigation ditch were built in that project during the time you were project engineer, do you have any idea?

A. There are a number of miles but I couldn't, that is a matter of record and I couldn't recall.

Q. Considerable irrigation ditches?

A. Oh, yes.

Q. And they were designed for the purpose of carrying water? A. Correct, they were.

Q. And did you get complaints they didn't carry water?

A. Sometimes, yes; sometimes people couldn't get as much water as they wanted and there was always complaints.

(Testimony of Paul G. Anspach.)

Q. And in those instances could you remedy it?

A. The best we could.

Mr. Cyr: That is all.

Mr. Wuerthner: No further questions. I would like permission from the court to ask one further question.

Recross Examination

Q. (By Mr. Wuerthner): You stated this morning you are now retired? A. That is right.

Q. Are you engaged in any other business at the present time in your retired capacity?

A. No.

Mr. Wuerthner: That is all.

FRANK KUKA

was called as a witness and testified as follows:

Direct Examination

Q. (By Mr. Galles): Would you state your name, please? A. Frank Kuka.

Q. Where do you live and what is your occupation?

A. I live in Valier and I am a ditch rider for the Government.

Q. On what project?

A. The Badger Fisher Blackfeet Project.

Q. Is that the same irrigation project that Mr. Anspach has been testifying about?

A. Yes, sir.

Q. How long have you been a ditch rider?

A. 26 years.

(Testimony of Frank Kuka.)

Q. Continuously during that time? [99]

A. Yes, sir.

Q. And you still are the ditch rider?

A. Yes.

Q. Are you familiar with the lands that are involved in the leases which were issued to Mr. Aiken in 44 and 46? A. Well, I am.

Q. Have you inspected the laterals, both major and minor laterals as they have been called here in the vicinity of his land? A. Yes.

Q. Have you observed at any time water in those laterals? A. Yes.

Q. When did you observe water in those laterals? A. When last?

Q. Yes. A. Last year in '55.

Q. And for how many years has water been in those laterals?

A. Well practically every year to an extent and we run water it wasn't used for irrigation purposes, we put it into reservoirs at the end of those laterals.

Q. I will hand you what has been admitted in evidence as Plaintiff's Exhibit 1 which shows the leases to Mr. Aiken, the 44 lease being shaded in green and the 46 lease being shaded in red, and ask you at what points you have observed [100] water with reference to Mr. Aiken's leased lands?

A. Well I could answer that better what other one is because I am not familiar with this map.

Q. Well I will hand you Plaintiff's Exhibit No. 7 and ask you the same question?

(Testimony of Frank Kuka.)

A. This one was extended out here a little further. I forgot what the question was.

Q. At what point closest to Mr. Aiken's land did you observe water in the laterals?

A. To the end of these ditches. We have a reservoir in this one and I have run water down there.

Q. Now you are referring to the ditch marked No. 1 in red on this exhibit? A. Yes.

Q. Would you step down to the table with your green pencil and mark with the letter A the furthest point at which you observed water during the years, Mr. Aiken held these leases?

Q. Now with reference to the point that Mr. Anspach marked as No. 2 would you mark with the letter B the furthest point toward Mr. Aiken's land that you observed water during the years he had the leases?

Q. Now with reference to the point Mr. Anspach marked No. 4?

A. I had water on this one too. [101]

Q. Would you mark with the letter C the point to which you are referring to that you had water in this one too?

A. This No. 2 here, we extended this lateral in '41. We extended that lateral in '41. I had water out there.

Q. You are attempting to mark on the scotch tape and it does not mark. It is in the middle of the scotch tape. Why don't you put the letter C on each side of the scotch tape at the point we are referring to? Now with reference to the figure 4

(Testimony of Frank Kuka.)

that is on Exhibit 7 at what point did you observe water closest to Mr. Aiken's land? Would you mark it with the letter D, please?

A. You mean during the time he had the lease?

Q. Yes. A. Water here.

Q. Is that the closest point to Mr. Aiken's land?

A. No, I have seen it down here.

Q. That is the point I want you to put the letter D? Did you put two D's on the scotch tape, and for the record it will be the point as seen between the two letters. Now you have so marked the exhibit, is that correct? A. Yes.

Mr. John Wuerthner: May I suggest to the court that the defendant's land be outlined on this map in red? We are kind of misled by the exhibit. I don't believe the land has been shown on there. [102]

The Court: You can take that up and develop it on cross examination.

Mr. Wuerthner: Very well, sir.

Q. (By Mr. Galles): There were headgates, were there headgates in the irrigation system at the points you have marked with the letters?

A. At one time, yes.

Q. Were there headgates there during the time Mr. Aiken had the leases? A. Yes.

Q. And is that the point at which the water was delivered to and is that what was the reason it wasn't down further because of the headgates?

A. It was never called for any further; there was no reason to deliver it beyond there.

(Testimony of Frank Kuka.)

Q. That was the end of the constructed ditches?

A. Yes.

Mr. Galles: You may examine.

Cross Examination

Q. (By Mr. Wuerthner): Mr. Kuka, have you been employed on this job for 26 years did you say?

A. Yes, sir.

Q. Have you always been a ditch rider on this project? A. Yes, sir.

Q. Do you know what ditches were in existence in 44 in regard to the defendant's land here?

A. Yes.

Q. Do you know what ditches were in existence on that land in '39? A. Yes, I do.

Q. Do you know whether or not the defendant farmed this land in '39? A. I believe he did.

Q. And do you know whether or not he farmed it from that time until '44 when he took the lease in question? A. Yes.

Q. Are you familiar with O & M charges?

A. No, I didn't have no part with that.

Q. You had nothing to do with the assessment of the charges? A. No.

Q. Now, Mr. Kuka, I am handing you the Plaintiff's Exhibit 1, now you will notice that exhibit has outlined in green the defendant's land? Is that approximately where his land was under lease in '44?

A. I would say it was approximately. [104]

(Testimony of Frank Kuka.)

Q. And do you know that this red land, encased in red was also under lease by him?

A. I knew he had grazing lease down there but I don't know in particular.

Q. Now you are familiar with the contour of the land at that area?

A. Well pretty well; I have been there quite a while.

Q. Now would you explain to the court about that gully called rock gully?

A. That is right.

Q. And that runs through about the middle of the land indicated by the green shading?

A. Well I wouldn't say the middle. I would say it went to the north.

Q. Further north? A. Further north.

Q. Is that correct? A. Yes.

Q. Now is that gully a steep grade?

A. Well not right up to it; it is after you get up to it but I would say it wasn't too steep until you get right into it.

Q. Now you see located on this exhibit various red marks and blue marks, is that correct? [105]

A. Yes.

Q. Do you know what those marks represent?

A. No, sir, I don't.

Q. For your information they represent ditches; now is that approximately the situation with regard to ditches as they existed in '44?

A. You mean this was a ditch here?

(Testimony of Frank Kuka.)

Q. Yes. A. That wasn't there.

Q. Now will you step down and make some notations on this exhibit, please, so that the record will be straight? A. Yes.

Q. Now you have just testified that a portion of the ditch from this circle to this point was not constructed in '44?

A. Not that I know of, not to my knowledge.

Q. All right will you mark a No. 1 or one there on that? A. Like this?

Q. Yes, and No. 2 at the other extremity. Now the ditch shown by the, between the distance 1 and 2 was not constructed in '44, is that correct?

A. Not that I know; not that I recall.

Q. In red pencil 1 and 2, now do you know when that ditch was constructed?

A. I don't think it ever was. [106]

Q. It is not on there at the present time?

A. No.

Q. Now referring you to what has been marked No. 3 in red pencil, did you recognize that junction?

A. Yes, sir.

Q. What is that junction?

A. That is a division of this 19 K ditch here.

Q. That is a main lateral? A. Yes, sir.

Q. And the branch was the red letter 3, red letter 3 approximately there, now does that map substantially portray the situation with relation to the minor laterals that branch off as it existed in 44?

A. I would say that was fairly close.

Q. In other words, the ditch shown from red 3

(Testimony of Frank Kuka.)

to blue 4 is the situation regarding that minor ditch as it existed in '44?

A. This ditch is in there.

Q. And that is approximately correct then?

A. Yes, sir.

Q. Now with relation to red No. 4 and blue No. 3, is that the condition with respect to that lateral?

A. Is this 3?

Q. Yes.

A. Yes, I helped bring this one out there. [107]

Q. Does that extend on to the ditch line in section 30? A. It extends right to there.

Q. Right to the border?

A. Right to the line.

Q. Now calling your attention to a ditch or lateral which is shown as between red 3 and blue 2, does that ditch, was that ditch in there as of '44?

A. Up to about here, I would say.

Q. All right, will you mark a number, red 5 at that point? A. Yes.

Q. Now from red 5 to the point represented by blue No. 2, the ditch did not exist in '44?

A. I would not say. It could be formed or it might be in there, I don't remember.

Q. You don't know whether it was in there?

A. I don't recall.

Q. If it was in there, it would not come up to the defendant's land?

A. This one would here.

Q. All right now you are referring to a point

(Testimony of Frank Kuka.)

shown as red 6 to red 7, was that ditch in there in '44? A. Yes, sir, it was up to here.

Q. All right, it ran up to approximately red No. 8? A. Yes. [108]

Q. Now is that the ditch situation?

A. I think so.

Q. As it existed in '44? A. Yes.

Q. Now was it the same in '45?

A. Yes, approximately.

Q. How about '46? A. Same.

Q. '47? A. Yes.

Q. What about '48?

A. Well they were in there.

Q. Was there anything else done in '48?

A. As to what?

Q. As to the ditches?

A. Well we had a breakdown in the main canal.

Q. Where is the main canal that you are referring to?

A. It doesn't show it on that map.

Q. There are no laterals here that show the main canal, where it would be then?

A. No, these are branches off the main canal.

Q. And there was a breakdown in the main canal leading to lateral K and the rest of the exhibit? A. In '48.

Q. What happened then? [109]

A. We had a heavy rain and it washed the flume out and broke the ditch out.

Q. Where did that water escape to?

A. To the lower ground and into the river.

(Testimony of Frank Kuka.)

Q. Did it go into rocky gully?

A. No, it never got that far.

Q. Now the situation in 44 will you tell the court whether or not you saw water in any of these ditches, and, if so, will you indicate on the map the point at which you saw water?

A. In '44 to the end of these, to this one here I personally put water to it.

Q. So in '44 there was water to red 5?

A. That is right.

Q. And no further? A. No.

Q. Why couldn't you get it any further?

A. There was no call for water.

Q. Would it have gone further?

A. It would have, yes.

Q. You are sure of that?

A. If there was a lateral there.

Q. There was no lateral to carry the water to the defendant's land in '44?

A. Not that I know of. [110]

Q. All right, will you indicate any other ditches in which you saw water in '44?

A. I have seen water in this one in No. 4.

Q. You are referring to the ditch red 3 to red 4?

A. Clear through to the end.

Q. And the water was up to blue 4?

A. Yes.

Q. And that is the end of the ditch?

A. Yes, I put it out on this side. There was a turn out for reservoir over in here.

(Testimony of Frank Kuka.)

Q. What was your purpose in running water in these ditches?

A. Filling the reservoirs there from here.

Q. It was not used for irrigation?

A. No, it was not used for irrigation.

Q. Now what is the situation with regard to the ditch terminating at blue 1?

A. That is on the north side of the canal.

Q. Where is the furthest point you have had water there?

A. I have had the water out to the end.

Q. Clear out to the end represented by blue 1?

A. Yes.

Q. And what was the purpose for it out that far?

A. I ran it out there for waste as waste ditch.

Q. And you ran that then into the coulee? [111]

A. That is right, into this coulee here.

Q. Very well, you may take your seat. Now, Mr. Kuka, do you know the general terrain of this land that Mr. Aiken leased? A. Well pretty well.

Q. What type land is that?

A. It is sort of rolling; it is a heavy soil.

Q. Sandy soil?

A. No, it is heavy gumbo soil I would say.

Q. Is that soil susceptible to irrigation?

A. Yes.

Mr. Cyr: To which we object on the ground it is outside the scope of the direct and this witness has not been qualified as an expert and it calls for a conclusion and opinion of the witness.

(Testimony of Frank Kuka.)

The Court: Yes, I think so. You can qualify him if you want to examine him as an expert.

Q. How many acres could be irrigated out of this land Mr. Aiken leased?

Mr. Cyr: We object to that on the ground it is outside the scope of the direct examination. I don't see any probative value in the statement of this witness who has only been a ditch rider for the period in question.

The Court: Sustain the objection.

Q. Is it a fact, Mr. Kuka, you rode these ditches every [112] day? A. Yes, sir.

Q. Do you know what type farming Mr. Aiken did during the term of his lease?

A. Well part of it he strip farmed.

Q. Did he do any summer fallowing that you know of? A. Yes.

Q. How many acres approximately do you know? A. I wouldn't know.

Q. Did he practice any weed eradication?

A. Yes.

Q. Do you know whether or not Mr. Aiken ever used any irrigation water on this land from 39 to 49?

A. I delivered water personally to him in 42 in July.

Q. You what?

A. I delivered water to Mr. Aiken in 42.

Q. That water you delivered was it used on all of the acreage or a portion? A. A portion.

Q. Approximately how many acres did he use

(Testimony of Frank Kuka.)

that water on? A. 74 acres I believe.

Q. Did he call for any water after that time?

A. Well I can't recall it.

Mr. Wuerthner: That is all.

The Court: We will suspend here for a few minutes. [113]

Court resumed, pursuant to recess at 3:30 p.m., at 3:45 p.m., at which time all parties and counsel were present.

Mr. Galles: The next witness is Mr. Spencer.

CHARLES S. SPENCER

was called as a witness by plaintiff and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Galles): Would you state your name? A. Charles S. Spencer.

Q. Where do you live?

A. Browning, Montana.

Q. Your occupation?

A. Superintendent of the Blackfeet Indian Reservation.

Q. How long have you been so employed?

A. Since September 1, 1954.

Q. In your capacity as Superintendent of the Blackfeet Indian Reservation are you the official custodian of the records of that office?

A. Yes, sir.

Q. I hand you a file among which are some papers, one of which exhibit has been previously

(Testimony of Charles S. Spencer.)

marked Plaintiff's Exhibit 8, and ask you if that is part of your official records? [114]

A. It is, sir.

Q. And is that Exhibit 8 kept in the regular course of the business of the Indian Agency?

A. It is.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 8.

Mr. Wuerthner: To the introduction of Government's proposed Exhibit 8 in evidence the defendant objects on the grounds and for the reason the same is a self serving declaration, and further ground that it is by its own term or states that is according to the provisions of the leases indicated and they have specified the two leases in question that the O & M charges were due and unpaid. Now by the Government's own witness he has testified there was nothing in the leases that O & M charges were due and payable.

The Court: Well let's see them.

Mr. Galles: Your Honor will recall Mr. Anspach identified the document, Exhibit 8, as having been a copy of what was sent to the Tribal office and the Indian Agency office and as well as one to the lessee, and as well as one copy in the engineer's office.

The Court: Yes, I think the objection should be overruled; it may be admitted in evidence. It is part of the official documents of the office. [115]

Q. (By Mr. Galles): Mr. Spencer, with reference to Plaintiff's Exhibit No. 8 would you state

(Testimony of Charles S. Spencer.)

what that document is as part of your official records?

A. That is a carbon copy of the statement mailed to Mr. Robert Aikens on January 2nd, 1948, of O & M charges due plus interest to January 31, 1947?

Mr. Wuerthner: May it please the court, we are going to object to the testimony on the ground the instrument speaks for itself.

The Court: Yes, but he can explain it.

Mr. Wuerthner: And we will further move that the answer of the witness be stricken.

The Court: The motion is denied.

Q. Mr. Spencer, I now hand you one of the papers from your official file of the agency which has been extracted and marked Plaintiff's Exhibit 9 and ask you to state what that is?

A. That is likewise a carbon copy of the statement.

Mr. Wuerthner: Now your Honor we object to that. We believe the proper question is can he identify it and the answer would be yes or no.

Q. Would you please identify it?

A. That is one of the official records of our office indicating the amount of O & M charges plus interest due at this particular time from Mr. Aiken.

Q. I notice this is a carbon copy, what happened to the original?

A. The original was mailed to Mr. Aiken.

Q. But this carbon copy is part of your official records of which you are the custodian?

(Testimony of Charles S. Spencer.)

A. It is.

Q. This Exhibit 9, Mr. Spencer, you will note consists of two pages, would you state what the difference is in the two pages? Why are there the two parts to the exhibit?

A. One of them pertains to lease No. 629 and the other to lease No. 761, so they are individual statements on the two separate leases.

Q. And those leases have heretofore been identified as the 44 and 46 leases? A. Correct.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 9.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's proposed Exhibit 9 the defendant objects on the same ground and for the same reasons as stated for the Plaintiff's Exhibit 8, and on the further grounds that there is no showing here this statement was ever received by the defendant and was not sent by registered mail and no evidence [117] he received it, and on the further ground that there has been no demand made on the defendant to produce the original of this document and therefore we believe that it is secondary evidence of the records and inadmissible.

Mr. Cyr: Your Honor, as official business record it does not come within the classification of secondary evidence but is primary evidence.

The Court: Is it the same as the other records?

Mr. Cyr: It is the same as Exhibit 8 and including the——

(Testimony of Charles S. Spencer.)

The Court: Overrule the objection; it may be admitted in evidence.

Q. (By Mr. Galles): Mr. Spencer, handing you again Plaintiff's Exhibit No. 9 would you state the date that this document was made, the original of which you testified was mailed to Mr. Aiken?

Mr. Wuerthner: We object on the ground the instrument speaks for itself.

The Court: Overrule the objection.

A. This instrument was dated March 23, 1951 and was mailed to Mr. Aiken on or about that date and it shows—you want me to——

Q. Yes, what are the charges that are shown to be due for the O & M charges?

A. It shows the principal on lease 629 as \$2,722.50 [118] plus interest to April 30, 1951 of \$608.03, for a total of \$3,330.53. Page 2 of the exhibit was mailed on the same date and shows principal due of \$370.00 and interest to April 30, 1951, of \$40.70, with the total of \$410.70 due on April 30, 1956.

Q. Mr. Spencer, do your records reveal whether or not this sum or any sum has been paid for the O & M charges?

Mr. Julius Wuerthner: That is objected to because that is asking him about certain letters that we have no opportunity to examine the witness about on cross examination.

Mr. Galles: You must have misunderstood; I asked if his records showed this amount or any amount had been paid?

(Testimony of Charles S. Spencer.)

Mr. Julius Wuerthner: We object unless the records are in court so that we can cross examine him on them.

The Court: You can ask him if he examined the records to see whether any payment has been made.

Q. Did you examine the records?

A. I inquired from the only two collector agents we have who receive this money and they said there have been no payments made.

Mr. Julius Wuerthner: Now we move his answer be stricken as hearsay.

The Court: Yes, it is hearsay.

The Court: Have you looked into the records yourself and gone into the various accounts to see whether there is [119] any evidence of payment ever being made?

A. No, I haven't.

Mr. Galles: You may examine.

Mr. Galles: Could I ask one question or two more?

The Court: Yes.

Q. Mr. Spencer, you have the records and files available to you here in the courtroom here in Great Falls from which you can make an examination to determine whether or not payment has been made?

A. Yes, sir.

Q. Can you do that now?

A. They are in the back of my car; it is the water users ledger; it is in the back of my car just across the street. It is an immense book.

The Court: We won't finish tonight and he can

(Testimony of Charles S. Spencer.)

do that between now and tomorrow morning and you can bring that question up again if you want to.

Mr. Galles: That is all.

Cross Examination

Q. (By Mr. Wuertner): Now as I understand it, Mr. Spencer, you examined this Defendant's Exhibit 7 and these statements which you have testified to? [120] A. That is right.

Q. Do you know whether or not the defendant received these statements Plaintiff's Exhibits 8 and 9? A. No.

Q. You don't know whether or not they were sent by registered mail?

A. I question that they were; I do not know.

Q. You think they were sent through ordinary mail? A. Yes, sir.

Q. Now according to the terminology which appears in both exhibits 8 and 9 it states that, "According to the provisions of your lease(s)—" do you see that language appearing thereon?

A. I would have to re-examine the leases.

Q. I am asking you if you find the language appearing on this exhibit which reads: "According to the provisions of your lease indicated below, the following O & M charges are due and unpaid." Do you find that language there?

A. In this?

Q. Yes. A. Yes.

Q. You find that in exhibits 8 and 9?

A. Yes.

(Testimony of Charles S. Spencer.)

Q. Now I am handing you Plaintiff's Exhibit C and Plaintiff's Exhibit B, which are true copies of the leases [121] indicated on Plaintiff's Exhibits 8 and 9, which you are holding, and ask you to examine them and tell the court whether or not there are any provisions in there which provide for the payment of O & M charges?

Mr. Cyr: Your Honor, counsel has been making this same inquiry and I don't want to delay this but I object to this question on the grounds the instruments referred to have been admitted in the pleadings by counsel for the defendant and they are part of the court records and speak for themselves. Whether he can see it there or not is immaterial. One of the issues in this case is reformation of those instruments. Now obviously if we ask to reform this witness can't advise the court if he has no personal knowledge because he was not in this position until '55.

Mr. Wuerthner: May it please the court, we hope we have a chance to go into the terminology appearing in those two exhibits which indicates those charges were assessed, what basis or reason they were, and further now this gentleman has testified that those two exhibits are official records of his office, but we hope now we have a chance to go behind that and see the basis of these charges which he says are due and owing.

The Court: According to the provisions of the lease. Well is he familiar with these leases; has he ever read them or ever seen them before? [122]

(Testimony of Charles S. Spencer.)

Mr. Wuerthner: I will find out, your Honor.

Q. Mr. Spencer, are you familiar with leases of this type? A. Yes, sir.

Q. And you are familiar with reference to O & M charges? A. Yes.

Q. And I believe you stated you have a ledger showing O & M charges? A. Yes, sir.

Q. Then I believe you are familiar with leases which you have in your hand with reference to any charge that may appear thereon or any reference to charges? A. In general.

Q. Well then will you examine those two leases and tell the court whether or not you find any reference or any obligation on the defendant to pay these charges?

A. Yes, the lease F 761, paragraph 6, "Operation and Maintenance. It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)." It is also typed in the bottom of the lease.

Q. On the same lease, that is 761? [123]

Q. And that is Exhibit D? (attached to complaint).

A. Exhibit D. I will read the entire statement:

"All land to be farmed as irrigated farm land on a crop rotation basis. This land must consist of at

(Testimony of Charles S. Spencer.)

least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. All farm lands to be farmed in a husband-like manner on a crop rotation basis, with at least one leguminous crop on all five-year leases. No land to remain fallow over the winter. Irrigation water assessment to be paid——

Q. And read on the reverse side at the top?

A. "at the same time rental is paid."

Q. Now did you find any reference in Exhibit C with reference to the payment of O & M charges?

A. Except that statement which states:

"If it is shown to be necessary to practice weed eradication for one year only out of 5, water charges will not be required for that year if water is not used."

I would say only by inference.

Q. No direct agreement by the defendant to pay O & M charges?

A. Not in the lease.

Q. May I call your attention to whether or not paragraph 6 of Exhibit D had reference to O & M charges which you read to the court appears in the other lease?

A. It does not.

Q. It has been dealeated? [124]

A. No, it hasn't been deleted.

Q. Will you explain why that is not included?

A. That is a '29 form that was used for some reason unknown to me in lieu of the proper form

(Testimony of Charles S. Spencer.)

that should have been used at that time and which was used in the other lease.

Mr. Wuerthner: That is all.

Mr. Cyr: We offer in evidence Plaintiff's Exhibit 10 which is a certified copy of the originals in the office of the Bureau of Indian Affairs under the seal of the Commissioner of the Bureau of Indian Affairs certified by the executive officer thereof. This is offered for the purpose of showing that demand was previously made upon this defendant as a result of correspondence which the original of which was signed by the attorneys for the defendant in this case.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibit 10 the defendant objects on the ground and for the reason no sufficient foundation has been laid for the introduction into evidence of this document. There has been nobody to properly identify it under oath, and on the further grounds that this instrument does not appear to be an exemplification as we believe is required on instruments of this type, and that they are not the originals of the documents which are contained therein. [125]

Mr. Cyr: Your Honor, the documents are under the seal of the Commissioner of the Bureau of Indian affairs, certified to be true copies of the originals which are on file in his office. I don't believe the rule or statute requires they be exemplified, the seal takes care of the oath and I think they are admissible, your Honor, for the purpose. I think

there is no question of their admissibility and I think they are material to show that a demand has previously been made.

The Court: Well, gentlemen, I think this correspondence has a material bearing on the issues of the case and properly authenticated and I will overrule the objection and it will be admitted in evidence.

Mr. Cyr: Your Honor, with the same reservation that we would like to recall Mr. Spencer after he has had an opportunity to examine his records to determine whether or not these assessments have been paid, we rest.

Mr. Julius Wuerthner: We can save just a little bit of time, your Honor——

The Court: You can have a ten minute recess if you want it.

Mr. Julius Wuerthner: I don't believe it will take that much time, your Honor, because there is something in the pretrial record here, your Honor.

Mr. Cyr: Counsel for the defendant has agreed that [126] they will stipulate that the O & M charges to which the witness Spencer testified have not been paid by the defendant Aiken.

Mr. Julius Wuerthner: But that the rentals had been paid other than that.

The Court: Very well, let the record show that.

Mr. Cyr: And it won't be necessary to recall Mr. Spencer, and the Government rests.

Mr. John Wuerthner: At this time, your Honor, we have a motion I would like to make.

The Court: Very well.

Mr. John Wuerthner: The defendant moves to dismiss the plaintiff's first cause of action on the ground and for the reason that the Government has failed to sustain the burden of proof of its allegations, and furthermore have failed to sustain the burden of proving by a preponderance of the evidence or any evidence whatsoever that by mutual mistake and inadvertence of the parties to the lease marked Exhibit C that there was an agreement on the part of the defendant to pay O & M charges under that lease. Now our motion to dismiss is also directed to the second cause of action on the ground that the Government has failed to sustain the burden of proof by the preponderance of the evidence the allegations of that cause of action. Does the court wish argument on it? [127]

The Court: Well, no, we won't have any argument on it now. The court will take that under consideration and you may proceed with the case. Of course that would be your final motion anyhow after you concluded the case very likely.

Mr. John Wuerthner: May it please the court, at this time the defendant would like to make a brief statement of what we expect to prove as a defense in this matter.

We expect to prove that the land involved in these two leases is not susceptible of irrigation and we are not going to prove it by technical means but we will prove it by those who live in the locality and have lived there for many years and know this land.

We will show that this land has been strip-farmed

for many years last past, and also the fact when it is strip-farmed it does not permit of any irrigation.

We will also show that the defendant had a lease on the same land for five years prior to the 44 lease and during that period there was absolutely no mention made of any O & M charges and the defendant was under the understanding this was dry-land and was not irrigable.

The defendant will also prove that at the time he entered into the 44 lease that he was not aware of the fact that there were any O & M charges [128] that were going to be assessed to him; that there was no mutual mistake on his part; that he entered into this lease with the impression he would have it on the same terms he had it previously, and that it would be farmed as drylands.

The evidence will show the land was broken in 33 and after that time it began to wash and wind erosion set in, and he will show the only practical method of farming was by the strip method and we believe by his testimony we will show the Government is not entitled to reform the lease of '44.

We will further show with reference to the other lease that there were no ditches available to him to irrigate the land covered by the lease of 46.

We will show that the ditches that existed with reference to that land in '46 could not possibly be used for irrigation inasmuch as another party moved into the lands formerly occupied by the defendant under the '44 lease and it was thereafter impossible for him to dig a ditch across those lands he no longer leased during the last two years of his

lease, and I believe when our evidence is in the court will be justified in dismissing the complaint of the Government as to both causes of action.

The Court: You may proceed, gentlemen. Call your first witness. [129]

HENRY L. HENNEMAN

was called by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. John Wuerthner): State your name, please. A. Henry L. Henneman.

Q. Mr. Henneman, are you here in response to a subpoena for the defendant? A. I am.

Q. Are you acquainted with the defendant Robert Aiken? A. I am.

Q. How long have you known him?

A. Probably 20 years.

Q. You have heard the testimony previously given in this case? A. I did, sir.

Q. Are you acquainted with the land in question, the lands formerly leased to Mr. Aiken?

A. Very well acquainted with part of it.

Q. Will you tell the court what that acquaintanceship consisted of?

A. It consists of my farming it for 7 years since Mr. Aiken had it.

Q. You say you have farmed this land for the last 7 years? [130]

A. The last seven years, yes, sir.

Q. Did you farm all of the land in question in this case? A. No, sir.

(Testimony of Henry L. Henneman.)

Q. How much land did you farm, referring to Plaintiff's Exhibit 1 could you estimate how much less of the land in the green shading that you are farming?

A. How much less is in the green shading than what I farm?

Q. Yes, you can give it by the acre if you want, so many 40's? A. I would say six 40's.

Q. You farmed six 40's less than Mr. Aiken in that area? A. Yes, sir.

Q. Did you have a lease on the area shown in the red shaded portion? A. Yes, sir.

Q. You have leased all of that?

A. Yes, sir.

Q. Now are you acquainted with the ditches on this land as they existed in '44?

A. On this particular land?

Q. Yes. A. Not in '44.

Q. Were you there in '44? A. No, sir.

Q. When did you first come upon this land?

A. '49.

Q. And did you lease in that area prior to that time? A. I did, sir.

Q. Whereabouts?

A. I lived right in Valier but I farmed on the reservation prior to that time that I started farming this land.

Q. How long have you farmed in that vicinity?

A. Fifteen years.

Q. Now handing you Plaintiff's Exhibit 1 I will

(Testimony of Henry L. Henneman.)

ask if you recognize the blue and red lines that appear thereon? A. These lines here?

Q. Yes. A. I do, sir.

Q. What are those lines?

A. They represent the ditches leading to these lands.

Q. Now were you acquainted from the years '44 to '49 with the ditches in that area?

A. Not up to this area, no, sir.

Q. Were you ever over this land prior to '49 when you took a lease? A. No.

Q. You don't know anything about what ditches were in there prior to that time? A. No, sir.

Q. Does this map reflect the situation with regard to [132] the ditches as of '49 when you took this lease?

A. Yes, sir, up to a certain point.

Q. Now referring to point 1 in red pencil does that represent the end of the ditch in '49?

A. Yes, it does.

Q. Referring to blue 1 does that represent the end of that ditch?

A. That ditch I wouldn't know about. I am not acquainted with that one.

Q. Referring you to blue 4 as appears on the Exhibit does that represent the terminal point of that ditch in '49 so far as you know?

A. Yes, sir.

Q. That is approximately correct?

A. Approximately, yes.

Q. Now referring to blue 3 does that terminal

(Testimony of Henry L. Henneman.)

point represent approximately the end of that ditch in '49? A. That is this circle here.

Q. Yes. A. Yes, sir.

Q. And referring to red 6 to red 8 which ditch has been scratched off does that represent a ditch or was that ditch in there in '49 when you took over this land?

A. No, that ditch was not there that I recall.

Q. The terminal point of that ditch would then end at [133] what point?

A. I don't know if that ditch was in there in '49.

Q. You are referring to the ditch between red 6 and red 8?

A. Not in '49 to my knowledge that ditch was not there at all.

Q. Now referring again to Plaintiff's Exhibit 1 can you tell us about those three ditches you know about whether or not since '49 you have seen any water in them?

Mr. Cyr: To which we object on the ground it is immaterial whether there has been any since '49.

Mr. Wuerthner: I believe we can go into whether or not they were capable of carrying water. The Government went back '31 in their ditches.

The Court: Well let him answer; maybe it will have some bearing on it.

A. I have seen water up to this point here.

Q. Which point are you indicating?

A. Right here.

Q. Up to point red 3 you have seen water that far? A. Yes, sir.

(Testimony of Henry L. Henneman.)

The Court: On what time, when?

Q. When did you see water in that ditch approximately?

A. Nearly every year that I have been out there.

Q. And was that water available for use by you?

A. No, sir. [134]

Q. What was the purpose of putting the water up there, if you know?

Mr. Cyr: We object, it calls for a conclusion of the witness.

Mr. Wuerthner: He can testify if he knows.

Mr. Cyr: No proper foundation.

The Court: Does he know; what year is he talking about?

Mr. Wuerthner: He has testified there has been water in that ditch every year?

The Court: What years?

Q. What years are you referring to? Every year that you have had the lease?

A. Yes, sir, every year since '49 that I have been farming out in that neighborhood.

Q. And have you used any of that water since you have had the lease? A. No.

Q. Have you had any need for it?

A. No.

Q. But the water has been up to this point represented by red 3? A. Yes, sir.

Q. Is that water dumped or does it stay in the ditch or what happens to it?

A. I believe there is a canal over here to the gully. [135]

(Testimony of Henry L. Henneman.)

A. That is rock gully and the water drains into the gully? A. That is right.

Q. Now referring to the ditch from red 3 to red 1 has there ever been water in any portion of that ditch since your lease?

A. Not that I have seen.

Q. You have never seen any? A. No, sir.

Q. Now, Mr. Henneman, since '49 when you leased this ground have you paid any O & M charges? A. One year, sir.

Q. What year was that? A. '55.

Q. What was the term of your last lease?

A. Started in '49, lease commencing in '49.

Q. Until what year?

A. Until '54, through '54.

Q. Do you have a copy of that lease?

A. I have.

Q. Handing you what has been marked defendant's proposed Exhibit 11 I will ask you if you can identify it? A. Yes, sir.

Q. Will you identify it?

A. This is the lease. This is my lease copy that I was [136] issued from December 1st, 1949 through December 31, 1953.

Q. And this lease covers the same land previously leased to Mr. Aiken? A. Part of it.

Q. All of the land contained in this lease is a portion of the land leased by Mr. Aiken?

A. That is right.

Q. And referring you to the last page of this exhibit does your signature appear thereon?

(Testimony of Henry L. Henneman.)

A. It does, sir.

Q. And there are other figures appearing thereon? A. That is right.

Mr. Wuerthner: We offer into evidence for illustrative purposes only defendant's proposed Exhibit 11.

Mr. Cyr: Your Honor, we object on the grounds it is not material; it is not between the same parties; this is between Minnie Foundagun as per authority on file signed by the Superintendent. I suppose it is an allotment. There is no proper foundation in that it is not shown that all of the lands included in the prior lease was included in this, so it is not pertinent to the issues in this case.

The Court: What would it illustrate, if anything?

Mr. Wuerthner: First of all, your Honor, he has testified all of the land covered by that lease is included as portion of the land they are suing on. We will prove [137] by that instrument or attempt to show the intention of the parties of the indifference of the Government with regard to O & M charges both as to after the lease in question and before the lease in question. We will have testimony showing what the policy was prior to this time and also this goes to our denial there was mutual mistake.

The Court: As to these particular lands?

Mr. Wuerthner: Yes, sir.

Mr. Cyr: In that regard this is only a part of the holdings under the regulations; as I under-

(Testimony of Henry L. Henneman.)

stand them the land must be subject to irrigation and the water brought to a point on the land. Now there has been no showing the water was brought to this point of this land as in the case in issue.

Mr. Wuerthner: He hasn't testified as to the exhibit; we are merely offering it.

Mr. Cyr: That is because the similarity isn't shown between this and the issues in the case.

Mr. Wuerthner: This is offered only for the purpose of showing relationship of O & M charges called for here or not called for.

The Court: What part of the lands are not contained in this lease, how much?

Mr. Wuerthner: I believe you testified, Mr. Henneman, there were six 40 acre tracts. [138]

The Court: 240 acres of the land contained here, and what land was not? Was it irrigable land or non-irrigable land or were there any ditches on it? Is that the principal land in question under this case?

Mr. Cyr: This involves only the north half of section 30, your Honor.

The Court: I think perhaps you might be able to lay a foundation by going into that proposition so that it might illustrate something that might be material. You can find out the connection and how it is related, that this lease included all of the defendant's lease and it might show something for illustrative purposes.

Mr. Wuerthner: Very well, your Honor.

Q. Mr. Henneman, would you step down here?

(Testimony of Henry L. Henneman.)

Mr. Henneman, I am referring to Plaintiff's Exhibit 1 and I will ask you to put a circle around the X appearing in those 40 acre tracts which will indicate the land covered by the lease, Defendant's proposed Exhibit 11?

A. The land that is in this.

Q. The land that is in this lease that you have; will you please circle the Xs in those 40's? Now you have placed circles around the Xs representing the acreage covered by the lease which you had between 49 and 54, is that correct?

A. That is correct.

Q. Do you have a lease on this same land now?

A. I do, sir.

Q. In '49 did you lease any other land that was contained in the lease that you have testified to?

A. I did.

Q. Do you have that lease with you?

A. No, I haven't.

Q. Was that land covered by the land leased formerly by Mr. Aiken?

A. Part of it was, yes, sir.

Q. Can you indicate on this map the portion which you leased that is not shown by our Exhibit 11? A. How, sir?

The Court: That is the land that was under lease to Mr. Aiken?

Mr. Wuerthner: Which he leased in '49.

The Court: The land which was leased to Mr. Aiken which was not included in his lease?

(Testimony of Henry L. Henneman.)

Mr. Wuerthner: Yes, we will indicate that, your Honor.

Q. Now will you indicate the other land you held which Mr. Aiken formerly held by a square around the X in pen?

Q. Now, Mr. Henneman, on Plaintiff's Exhibit 1 you have indicated by a circle around the X the various 40 acre tracts which you leased from the Indian Council in '49, is that correct? [140]

A. That is correct.

Q. And that is represented by our proposed Exhibit 11? A. That is correct.

Q. And you have indicated with a square around the X those 40 acre tracts which you also leased from the reservation in '49?

A. That is correct.

Q. And they were also leased formerly by Mr. Aiken? A. Yes.

Q. And you took over from him in other words on these you have indicated? A. Yes.

The Court: Has he indicated the land formerly leased by Mr. Aiken that he didn't lease?

Mr. Wuerthner: Yes, he has. Do you want to see it?

Mr. Cyr: Yes.

The Court: No, I don't care to see it. I will look at it later.

Q. Now as you previously testified this Exhibit 11 is a lease covering a portion of the lands leased by Mr. Aiken which you took over from him, is that correct? A. That is correct.

(Testimony of Henry L. Henneman.)

Q. And the other land which you did not have a lease representing do you know whether or not the terms contained in that lease are the same as the lease [141] which you have produced?

A. They are not.

Q. They are not the same? A. No.

Q. Can you tell us what differences were in the other lease?

A. The other lease was an irrigated lease.

Q. A purely irrigation lease?

A. Yes, sir, and I have always ordered water on it.

Q. And that is the land which you have indicated by a square around the X?

A. There is part of that that is irrigated.

Q. And there is a portion of the other lease which is not subject to irrigation?

A. That is right.

Q. Now with reference to the area which you have drawn a circle around represented by the exhibit 11 is that an irrigation lease?

A. It is now.

Q. Well I am talking about in '49 at the time that lease was executed? A. No, it was not.

Q. And there were no O & M charges payable under that lease? A. No, sir. [142]

Q. Were there any assessments against you?

A. No, sir.

Q. Now with regard to the land comprising this lease, Defendant's Exhibit 11, will you tell the court the nature of that land?

(Testimony of Henry L. Henneman.)

A. There is quite a ridge runs the full length of the land and it slopes both ways from the ridge starting with quite steep and then leveling off.

The Court: That is the land that was not included in this lease but was included in the defendant's lease?

A. That is Exhibit No. 11.

Mr. Wuerthner: No, sir, he is describing his land which the defendant also leased; they both leased the same land.

The Court: Yes.

Q. Will you further describe this land with respect to the soil?

A. I would say it was quite a light sandy like soil which is very subject to washing or blowing and therefore it always has been farmed as strip land.

Q. Why has it been farmed as strip land rather than as irrigated land?

A. Just because I would say it is not suitable to be irrigated.

Q. Would it be subject to erosion?

A. Very much so. [143]

Q. Has that land eroded?

A. Very much, yes, it has.

Q. And does this strip farming method stop the erosion? A. It does.

Mr. Wuerthner: We will reoffer defendant's proposed Exhibit 11 for illustrative purposes only.

The Court: Have you described the lands that

(Testimony of Henry L. Henneman.)

was not included in this witness' lease that formerly was a part of the lease of the defendant?

Mr. Wuerthner: All right.

Q. Now referring again to Plaintiff's Exhibit 11 and referring specifically to the green shaded area which you have not made any mark on, now that area represents other land leased to the defendant, what have you to say with respect to that land whether or not it is irrigable or should be farmed as dry land?

Mr. Cyr: To which we will object on the ground no proper foundation, this witness hasn't been properly qualified as an expert to testify whether or not it should be farmed or not.

Mr. Wuerthner: Very well, I will lay a foundation.

Q. Mr. Henneman, are you acquainted with the other area shaded in the green which you have not marked? A. No, I am not.

Q. Do you know anything about that land on the other [144] side of the gully that is shown on the map? A. No, I am not.

Q. Have you ever been to that part of this area?

A. I would say no.

Q. And you have only farmed the 40's as shown by the circles and the squares?

A. Close to that area.

Q. Well have you ever looked that area over? They are adjacent, are they not? I am referring to the 40 running along the gully represented here by the map which is adjacent, one 40 which is the

(Testimony of Henry L. Henneman.)

northwest quarter of the northeast quarter of section 30?

A. That is a large gully running through there which you can't ride through with a pickup and for that reason I have never been over that side of that gully.

Q. Now with reference to the land appearing in the north half of the southwest quarter of section 25, as shown in the green shaded portion, are you familiar with that land?

A. Some, sir, yes, sir.

Q. You are farming one of those 40's?

A. Yes, sir.

Q. Are you familiar with the other 40?

A. Yes, it joins me right there.

Q. Now are you acquainted with the 40's that join on the west? [145]

A. Well this end, sir.

Q. Do you know the character of this land as to what the type soil is and the terrain type?

A. It would be pretty much the same as this on further east.

Q. Would all of this land in the green be about the same type land?

A. I would say it was.

Q. What do you know about the land represented by the red shaded portion, are you acquainted with that land?

A. Part of this is farm land and it would be practically the same soil as to but a little heavier.

(Testimony of Henry L. Henneman.)

Q. Do you know whether or not the portion shaded in red is susceptible of irrigation?

A. I don't know, sir.

Mr. Cyr: To which we will object on the grounds it is not material and further I will object to all this testimony on the ground it is not material; the law provides whether or not the land is irrigable.

Mr. Wuerthner: I will object to that statement.

Mr. Cyr: The regulations will provide what assessments are to be made and on which land. It is not for each individual owner within the area or lessee to decide for himself whether the land is or is not irrigable.

The Court: He hasn't qualified as an expert on what land [146] is irrigable.

Mr. Cyr: No, your Honor, but I wish to point out to the court the position of the Government. It does not make any difference whether he is farming or not, the law provides as pointed out by the witness before that all of this land is irrigable except that which is designated non-irrigable. This man had a lease which was a dryland lease which was a variation of the law and it does not make any difference whether he had another or not.

The Court: What I was trying to find out what he knew about the 240 acres that was included in the defendant's lease and included in his. That is all I was trying to find out, what he knew about it, what the character of the land was, the soil, whether there were irrigation ditches on it.

(Testimony of Henry L. Henneman.)

Q. Mr. Henneman, do you know anything about the land shaded in green and red that you have not leased with respect to irrigation ditches?

A. I am afraid I don't, sir.

The Court: Well it seems to me on the question of admissibility it is rather remote all right. Apparently for purpose of illustrating a policy, a rental policy that the defendant claims has taken place before and since the leasing to the defendant. So far as I can see it seems to me it is rather remote on the question of the policy; [147] however, it might have some bearing and I will allow him to put it in and we can consider it and see whether it has or not. It seems rather remote to the court at this time.

Q. Mr. Henneman, did you hear testimony this morning from a Government witness to the effect that the land shaded in red was irrigable from this terminal shown at No. 3, do you recall that testimony? A. I am afraid I don't.

Q. The time that you took this lease on the land described as the south half of the southeast quarter of section 30 isn't it a fact that the defendant still had a lease on a portion of the land involved?

A. That is right.

Q. Now will you show us which portion he still had a lease on? A. It was these two.

Q. In other words, the defendant had a lease on the south half of the southeast quarter of section 30, and he was farming while you had a lease on those 40's shown as the north half of the southeast

(Testimony of Henry L. Henneman.)

quarter and the northeast quarter of the southwest quarter of section 30? A. That is right, sir.

Q. Now do you know whether or not this ditch shown by blue pencil 3 ends, is that the correct terminal point? [148]

A. Yes, that is awful close.

Q. Now in order for the defendant to get water on the south half of the southeast quarter of section 30 it would have been necessary therefore for him to construct a ditch across land leased by you which he had previously leased?

Mr. Cyr: It calls for a conclusion of the witness; we object on the ground no foundation laid for this witness to express an opinion for necessity of constructing a ditch at any point.

Mr. Wuerthner: The defendant can give an opinion as to the route of the ditch if there was one to be constructed. The Government has testified——

The Court: You can inquire if a ditch were constructed the defendant would have to cross his land.

Mr. Wuerthner: All right, sir.

Q. Getting back to my original question, Mr. Henneman, if a ditch were to be constructed from the terminal point blue 3 to the land still owned by the defendant after '49 would the ditch have had to cross land leased by you? A. It would have.

Q. What would be the other alternative if a ditch were to be constructed?

A. To come from this ditch.

(Testimony of Henry L. Henneman.)

Q. You are pointing now to blue No. 4?

A. Blue No. 4. [149]

Q. And to extend blue 4 to the land described as south half of the southeast quarter of section 30?

A. That is right.

Q. Would it be possible to extend ditch blue 3, tracing that line, without crossing land leased by you?

A. I believe not.

Q. Why not?

A. That is the way the water would have to run from this ditch.

Q. It would have to run in an easterly direction?

A. That is right.

Q. And it would be impossible in your estimation for water to irrigate the land located in the south half of the southeast quarter of section 30 from terminal point blue 3?

A. I believe it would.

The Court: I think we had better suspend here.

(5:00 P.M. January 18, 1956. Adjourned until 10:00 A.M.) [150]

Court resumed, pursuant to adjournment, at 10:00 A.M. on January 19, 1956, at which time all parties and counsel were present.

The Court: You may proceed with the trial of the case. Call your next witness.

Mr. Wuerthner: Your Honor, I believe I was through with Mr. Henneman. I would like to call Mr. Henneman back to the stand with the court's permission.

The Court: Very well.

HENRY L. HENNEMAN

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Wuerthner): Mr. Henneman, handing you Plaintiff's Exhibit 1 so that you may refer to it in your testimony, I will ask you if you held a lease from the Government on a portion of the land colored red in the exhibit? A. Yes, I do.

Q. You heard Mr. Anspach's testimony yesterday that a certain part of that land is grazing land and therefore is non-irrigable, is that correct?

A. That is correct.

Q. The lease which you hold on this land is described as the south half of the southeasterly quarter of section 30, [151] is that correct?

A. Yes, sir.

Q. There's those two 40 acre tracts?

A. That is right.

Q. And those two tracts you heard Mr. Anspach testify are irrigable, is that correct?

A. That is correct.

Q. Do you hold a lease on those two 40's at the present time? A. I do.

Q. And did you hold a lease on those two 40's in '49? A. No, sir, not in '49.

Q. Well did you own a lease after Mr. Aiken's lease ran out? A. I did.

Q. You were the next lessee?

A. That is right.

Q. Now have you paid any O & M charges for water which you have or have not used on those

(Testimony of Henry L. Henneman.)

two 40 acre tracts? A. No, sir, I have not.

Q. You have never paid any O & M charges since you have leased those lands? A. No.

Q. Did your lease that you executed in 49 call for O & M charges? [152]

A. That lease was in '51, sir.

Q. I beg your pardon. In '51 did that lease call for O & M charges? A. Yes, it did.

Q. Were any O & M charges assessed against you? A. They were.

Q. And did you pay them? A. I did.

Q. Did you receive any water on those two tracts? A. No, I did not.

Q. Do you have a lease at the present time on those two tracts? A. I have.

Q. And does your present lease call for O & M charges?

A. The lease does, yes, but the O & M charges were taken off this lease?

Q. They were taken off? A. Yes, sir.

Q. What do you mean by that?

A. Well I asked for a recheck, it looked to me like this land would be hard to irrigate so I asked for a check. I believe it was Mr. Kuka I asked first and he said it could be arranged.

Q. You mean a survey?

A. Survey to check, which they did and they mailed me [153] back my check of \$133.20 which I had paid as water charge.

Q. You had paid that for water charges in advance?

(Testimony of Henry L. Henneman.)

A. In advance for '51 and they said that on this land due to the cost of the irrigation operation at that time they were willing to take that portion of my lease out as dryland.

Q. In other words, the Government did not require you to pay O & M charges of the two 40 acre tracts? A. No.

Q. And those are the tracts described in Mr. Aiken's lease at the present time? A. Yes.

Q. And that is known as the 46 lease which Mr. Aiken had? A. Yes.

Q. And the other tracts involved which are shaded in red are not farming tracts, is that correct? A. That is correct.

Q. Now, Mr. Henneman, referring you to Defendant's Exhibit 11 which is, your lease covered a portion of the land leased by Mr. Aiken under the what is known here as the 44 lease, I will ask you whether or not you paid O & M charges under this lease? You may refer to the lease if you wish?

A. No, not under this lease I never paid.

Q. Were any O & M charges payable under that lease? A. No. [154]

Q. Was there any provision in that lease requiring the payment of O & M charges?

A. The only provision there was that if and when irrigation was established I was then to pay O & M charges.

The Court: I didn't hear that.

A. The provision in the lease was if and when

(Testimony of Henry L. Henneman.)

irrigation was established I was to pay O & M charges which was never done during my lease.

Q. Now you are referring to the land involved in the '44 lease which Mr. Aiken previously held?

A. Yes, that is right.

Q. And are you referring when you say no O & M charges were paid to the terminology of the lease?

A. That is right.

Q. And you were referring then to the typewritten portion of the lease which states that rentals are to be increased, would you kindly read that to the court?

A. "Rentals to be increased 75c per acre on irrigated lands when irrigation service is established; lessee to notify the Blackfeet Indian Office immediately when such service is furnished."

Q. And what is the date of that lease?

A. December 1st, 1949.

Q. So that as of that date by the terms of this lease there had been no irrigation service established on the tracts [155] which you have indicated on the Plaintiff's Exhibit 1 by a circle around the X and a square around the X?

A. That is right.

Mr. Wuerthner: I believe that is all.

Cross Examination

Q. (By Mr. Cyr): I would just like to clear up a few things, Mr. Henneman. On which portion of this green marked portion of Exhibit 1 do you now pay O & M charges?

(Testimony of Henry L. Henneman.)

A. It would be on these 320 acres here.

Q. The north half of section 30?

A. That is right.

Q. Do you have a lease on the north half of the southeast and on the northeast of the southwest of section 30? A. I do.

Q. And you have not been charged any O & M charges on that? A. I pay water on that.

Q. You pay water on what?

A. That 120, I pay water on that.

Q. And do you now have on lease the south half of the southeasterly quarter of section 30?

A. I do. [156]

Q. And does the lease provide for O & M charges covering that? A. No.

Q. Is that the portion for which this check was delivered to the project?

A. My check was refunded back to me; that is the portion.

Q. That portion? A. Yes.

Q. Now to whom did you tender that check?

A. To this office there at the irrigation office at Browning.

Q. Well who did you physically hand the check to, do you remember? A. No, I don't.

Q. Do you have this check?

A. Not with me, no.

A. That I can't say; I think I do but I can't truthfully say that I have.

Q. You don't know whether you do or not?

A. No.

(Testimony of Henry L. Henneman.)

Q. The check was not cashed? A. No.

Q. How did you receive the check, how was it returned to you? [157]

A. It was returned by mail with a little notice along with it telling me that.

Q. And do you have that notice?

A. Not with me, no.

Q. By whom was the notice signed?

A. By Mr. Stout.

Q. And when was this? A. In '51.

Q. How much was the check? A. \$133.20.

Q. Have you looked at this check recently?

A. No, I haven't.

Q. How do you recall that figure so accurately?

A. It is on this, the figure is on the letter I received from Mr. Stout.

Q. And you have referred to that letter recently? A. I have.

Q. Do you have that letter with you?

A. No, I haven't.

Q. Where is the letter?

A. It is in my filings at home.

Q. Was this a mimeograph letter that you received?

A. Well, no, I don't believe it was.

Q. Was it typewritten? A. Typewritten.

Q. Do you remember the date on the letter?

A. No, I don't.

Q. Was it '51? A. It was in '51.

Q. And signed by Mark Stout? A. Yes.

(Testimony of Henry L. Henneman.)

Mr. Cyr: It will just take a moment, your Honor, to see if we can find it.

Q. Now, Mr. Henneman, the notice stated for this return of this check and the failure to assess you was because the ditch had filed with dirt in the prior year, isn't that true?

A. That was not stated in the letter, no.

Q. But do you know that to be true that the ditch had been blocked full of dirt and had to be cleared out?

A. Well there was no ditch to that land.

Q. Well where the ditch had been it had been filled with dirt, had it not? A. Yes.

Q. As a result of blowing? A. Yes.

Q. And that had occurred prior to the time of this, the time this check was returned to you, had it not? A. That is right.

Q. And that is the reason that you were to pay O & M [159] charges as soon as they made that point of delivery available again, isn't that true?

A. That is true.

Mr. Cyr: That is all.

Redirect Examination

Q. (By Mr. Wuerthner): Mr. Henneman, when did this ditch fill with dirt?

A. Well it was before my time there.

Q. It was full at the time you took over the lease, is that correct? A. Yes.

Q. And what is the present condition of that ditch? A. It is still full of dirt.

(Testimony of Henry L. Henneman.)

Q. Do you know who made this survey that you have testified to?

A. Frank Kuka and I believe Mr. Stout.

Q. Who is Mr. Stout?

A. He is the water engineer, he is classed as, at Browning.

Mr. Wuerthner: That is all.

Mr. Cyr: That is all. [160]

Mr. Wuerthner: Call Mr. Kuka.

FRANK KUKA

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Frank Kuka?

A. Yes, sir.

Q. And you have previously testified in this matter on behalf of the Government?

A. Yes, sir.

Q. I will ask you, Mr. Kuka, if you heard Mr. Henneman refer to a survey which you and Mr. Stout made of a certain ditch or ditches adjacent to the property here in dispute?

A. We made a survey to the land. It wasn't for a ditch; it was to check the land to see if water would be available upon it.

Q. And did this survey only affect the land which is described in this action under the 46 lease which Mr. Aiken formerly had?

A. I don't understand the question.

Q. I will withdraw that question. You may

(Testimony of Frank Kuka.)

refer to Plaintiff's Exhibit 1 here. Did your survey relate to the area shaded in red on Plaintiff's Exhibit 1? A. Yes, I believe it did. [161]

Q. And did it relate to the possibility of irrigating a certain portion of that red shaded area?

A. Yes, sir.

Q. And that portion is described as the south half of the southeast quarter of section 30?

A. Well it is southeast of the southeast quarter of section 30.

Q. Southeast quarter of the southeast quarter?

A. Yes.

Q. Isn't it a fact that both the southeast quarter of section 30 and also the southeast quarter of the southeast quarter of section 30 were irrigable?

A. They were.

Q. And you made this survey with relation to those two 40 acre tracts?

A. Let me explain that it was the summer following Mr. Henneman had done had blowed in between those lines and it caused a raise in the ground where a fence stood between. It was originally fenced off at one time and in order to get through that he couldn't get the water through there until we check it to tell where to go through with it.

Q. With relation to the surveys which ditch are you referring to now was blown over with dirt?

A. The ditch wasn't blown over with dirt. We had established our point there at the high point.— [162]

(Testimony of Frank Kuka.)

Q. You are referring to red or blue 4?

A. That is right.

Q. As terminus point of the ditch?

A. That is right.

Q. And was that ditch the one that had filled with dirt?

A. No, it hadn't filled; that ditch was okay to here.

Q. To red 4? A. Yes.

Q. But the portion beyond that had filled with dirt?

A. That is up to Mr. Henneman; if we deliver to the high point to take it from there on.

Q. I don't believe you understood my question. Read the question.

(Question read.)

A. Well I don't know, that had nothing to do with us.

Q. Didn't you make a survey for Mr. Henneman? A. Yes.

Q. And what did you determine as a result of your survey?

A. Well we determined that it had blown in there.

Q. The soil had moved during the winter.

Q. The soil had eroded? A. Yes.

Q. Does that soil move quite frequently?

A. It does if they block farm.

Q. If they block farm? A. Yes. [163]

Q. And what is the result if they strip farm?

A. That protects it.

(Testimony of Frank Kuka.)

Q. It protects it from eroding? A. Yes.

Q. Did you determine as a result of your survey whether or not the two 40 acre tracts you have been referring to were irrigable or not?

A. They were not at that time.

Q. What time was that survey made?

A. Well it was in I believe 51 but I can't recall the exact time.

Q. Sometime in 51? A. In early spring.

Q. And is that irrigable at the present time if you know? A. I don't think so.

Q. It is not at the present time?

A. I don't think so.

Q. Do you know whether or not it was irrigable prior to 51?

A. Yes, I delivered water there for 51.

Q. When? A. In 36, 7 and 35.

Q. That was prior to the time Mr. Aiken had that lease, is that correct? A. Yes, sir. [164]

Q. And did you deliver it for irrigation purposes? A. I did.

Q. Had there been any irrigation of this two 40 acre tracts since 36 or 37? A. No.

Q. None since then? A. No.

Q. Is it possible to irrigate where you farm by strip method?

A. Well it is not practicable.

Q. Now I believe you testified yesterday to the effect that water had been delivered in the ditches during the time Mr. Aiken had his lease?

A. I have had water up to those points.

(Testimony of Frank Kuka.)

Q. Did you deliver that water at Mr. Aiken's request? A. I did not.

Q. What was the purpose in delivering that water? A. For stock water.

Q. That wasn't for Mr. Aiken's use?

A. That is right.

Q. Isn't it a fact that you delivered water for the request of the users? A. That is right.

Q. And that depends on whether or not water is available? A. That is right. [165]

Q. And whether the ditch will carry water?

A. That is right.

Q. Now will you tell the court where or not any special material was used in constructing these ditches involved in this action? A. By what?

Q. Any non-porous material to hold the water?

A. There was none that I know of.

Q. In other words, the ditches were just dug out of the ground? A. That is right.

Q. But were they maintained?

A. We maintained them from year to year, yes.

Q. Isn't it a fact that many times water was running in portions of the ditches that they would wash and the water would escape into the gullys?

A. There is at times.

Q. But you at no time ever delivered any water at Mr. Aiken's request or for his use?

A. I delivered water to him in 41 and 42.

Q. Did he use it? A. Yes, sir.

Q. Where did he use it?

A. He used it on this tract up here.

(Testimony of Frank Kuka.)

Q. And was that water paid for in advance if you know? [166]

A. I don't know anything about it.

Q. Now you have testified, Mr. Kuka, to the effect that this land has eroded considerably?

A. Yes, sir.

Q. And I believe you testified that it had eroded because of the, well will you tell the court, I don't know whether I asked you or not if you know what causes this erosion?

A. Well I answered that once.

Q. I am sorry.

A. It was due to block farming in there in that area.

Q. To block farming? Do you recall whether or not Mr. Aiken farmed by the block method or strip method?

A. Well, I can't say for sure whether, he did some strip fallowing.

Mr. Wuerthner: I believe that is all.

Cross Examination

Q. (By Mr. Cyr): I believe you said on direct examination that this erosion was the result of the farming operation of Mr. Henneman, is that right?

A. Well, yes, it was one of them that leased it that way.

Q. When did you first observe this erosion on this land [167] to the extent as it could not be irrigated?

A. From away back in years of 30, in the 30's.

(Testimony of Frank Kuka.)

Q. It commenced away back? A. Yes.

Q. And after it commenced you have been able to deliver water to this land?

A. Yes, I have had to clear and maintain the ditches.

Q. And it was in the year 51 that you determined that the erosion had continued to such an extent it could not be irrigated, is that right?

A. On that particular piece.

Q. You are referring to the south half of the southeast quarter? A. Yes.

Q. Prior to that time it was subject to irrigation? A. That is right.

Q. Did you make that survey at the request of Mr. Henneman? A. We did.

Q. Now you testified that you delivered water to Mr. Aiken in 41 and 42, would you indicate on Plaintiff's Exhibit 2 where that water was used?

A. Here.

Q. You are referring to the north half of the north half of section 25? [168]

Q. And you delivered water to that in 41 and 42? A. Yes.

Q. And that was at the request of Mr. Aiken?

A. Yes.

Q. Was that used for irrigation purposes?

A. It was.

Mr. Cyr: That is all.

Mr. Wuerthner: That is all.

Mr. Wuerthner: Call Mr. Clarence Parlemee.

CLARENCE PARLEEMEE

was called by defendant and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Clarence Parlemee? A. Yes, sir.

Q. Where do you reside?

A. 10 miles northwest of Valier, Montana.

Q. Are you acquainted with the land involved in this action which was formerly leased by Mr. Aiken, the defendant? A. Yes, sir.

Q. How long have you resided in that vicinity?

A. About 29 years.

Q. And what has been your occupation?

A. Rancher. [169]

Q. And you have ranched all of that time?

A. Yes.

Q. And you are familiar with the ranching operations in that area? A. Yes, sir.

Q. Are you familiar with the system of irrigation canals or ditches that are involved in this action? A. Yes.

Q. And you know the approximate condition of these ditches during the time that Mr. Aiken had his leases? A. Yes, sir.

Q. Are you acquainted with the type of farming that is practiced in this area during the time Mr. Aiken had the lease? A. Yes, sir.

Q. Isn't it a fact that you had also leased land in the general vicinity of these leases in question?

A. I did.

Q. And with reference to the land formerly

(Testimony of Clarence Parlemee.)

leased by Mr. Aiken where is *your and* in a general direction?

A. Approximately half a mile south.

Q. Half a mile south?

A. Approximately, yes.

Q. And you are ranching under an Indian lease?

A. Well, both. [170]

Q. Let me ask you is your area covered by this irrigation project? A. Yes.

Q. And the land that you farm is it similar to the land involved in this action?

A. Very much so.

Q. Now you heard Mr. Kuka testify regarding some erosion that has gone on, do you know anything about that? A. Yes, I do.

Q. Do you know approximately how long this land has been eroding? Mr. Kuka stated it had been eroding since some time in the 30's?

A. It was broken up from the sod in about 23, along in there.

Q. '23?

A. Yes, and of course it didn't erode until the sod was worked out of it, '23 or I imagine that is correct; it really got down to business in the 30's to protecting.

Q. Do you know what method of farming Mr. Aiken pursued in farming the leased land in question, whether it was strip or block?

A. Strip.

Q. And did he strip farm during the entire term of his lease, if you know?

(Testimony of Clarence Parlemee.)

A. I believe so, every year from the start I couldn't [171] swear but to the best of my knowledge he stripped all the way through.

Q. Is that land being stripped at the present time? A. Yes, it is.

Q. Do you recall any time that land was block farmed? A. Yes.

Q. And do you know approximately when that was?

A. I believe about up until the time that it was broken until Mr. Aiken took it over, I believe.

Q. Are you aware of the fact Mr. Aiken was on this land in 39 or 40? A. Yes.

Q. And you say it was block farmed up until about that time?

A. About that time, I think.

Q. Do you do any irrigating on this land?

A. Not any more.

Q. Does anyone in the surrounding vicinity to this land or to Mr. Aiken's former land do any farming by irrigation? A. Very little.

Q. Do you farm by the strip method also?

A. Yes.

Q. Is it possible to irrigate land when you farm by the strip method?

A. It is possible but very impracticable. [172]

Q. Have you ever had an occasion to bid for some of this Indian land? A. Yes.

Q. Are you acquainted with the Government regulation that requires strip farming when you farm in a dryland area?

(Testimony of Clarence Parlemee.)

A. No, due to the fact that I haven't leased recently.

Q. What have you to say with regard to erosion when farming by the strip method?

A. It practically stops it; it does practically stop.

Q. And what about farming the block method in relation to erosion?

A. Impossible, the soil all blows away.

Q. Now do you know what type of soil was involved in the leases to Mr. Aiken?

A. Yes.

Q. What type soil was that?

Mr. Cyr: To which we will object on the grounds the witness has not been qualified as an expert in this case.

The Court: He has been farming there for 29 years, that ought to be some qualification.

Mr. Cyr: Within the area, I don't know that he has been on this land.

The Court: How long have you been ranching and farming including this land in question here?

A. 29 years.

The Court: About 29 years, that ought to have some probative value. [173]

Q. (By Mr. Cyr): Have you been on Mr. Aiken's land?

A. Many times.

Q. And is the land there the same as the land as you farm?

A. Yes.

Q. And the land which you farmed for 29 years if this land half a mile south of the lands here in question?

(Testimony of Clarence Parlemee.)

A. Yes. I didn't say that I had farmed that particular piece of land 29 years; I said I had resided there 29 years.

Q. You have resided there but you haven't farmed it for 29 years?

A. I farmed this particular piece of land for 19 years.

Q. That is the last 19 years? A. Yes.

Mr. Cyr: We will withdraw the objection.

Mr. Wuerthner: Would you read the last question?

(Question read: What type soil was that?)

Mr. Wuerthner: I am referring now to the soil involved in Mr. Aiken's leases?

A. The same as mine. It is a little lighter soil; it won't clod or, you know, get rough but on the ground disintegrate and blow.

Q. Now with reference to this type of soil what have you to say as to the irrigability? [174]

A. I had to quit irrigating mine; I couldn't handle the water.

Q. What do you mean by that?

A. It would just turn it out of your ditches and after it went just a little ways it will gather and gather and just wash gullys and wash your grain out down these ditches that are formed on its own gathering.

Q. In other words, the ditches become gullys if water is applied to the ditches, is that your testimony?

A. I didn't say that but that is right and it

(Testimony of Clarence Parlemee.)

washes the ditches so deep you can't get the water out of them.

Q. Have you ever seen water in any of the ditches involved in this case? A. Yes.

Q. Referring to Plaintiff's Exhibit 1 I will ask you if you have observed water in the ditch known as lateral K specifically between red 3 and red 4?

A. Yes.

Q. You have observed water in that ditch how often or when did you last observe water, I will put it that way?

A. Before Robert Aiken's time.

Q. And did you observe water in that ditch during the time Mr. Aiken leased that land?

A. No.

Q. You never saw water in it at that time? [175]

A. No.

Q. Do you recall that special incident that time that you saw water in that ditch any action of the water upon the ditch?

A. Oh, yes, it washed a big gully out clear down through here; I go down that way all the time.

Q. In other words, where would the gully extend, would it extend over into the green portion of the map?

A. Yes, it would; its filled in considerable now, but it did wash a big gully down through here.

Q. And in your opinion was it possible to irrigate where the water washed these gullys that you testified to?

(Testimony of Clarence Parlemee.)

A. I say no because I had to quit mine on this similar circumstances.

Q. What is the result of water washing these gullys with regard to the top soil you testified to?

A. Well it just washes it away and it washes it down in this next ditch below you would like to use and the silt settles in that and the ditches block up and they all run over.

Q. In other words, the water from one ditch will wash the soil over the land to the ditch below and cause it to flow over? A. Flow over.

Q. Would that make the ditch below incapable of any use? A. That is right. [176]

Q. Do you recall ever finding any water washing into what is known as rock gully, now that is the gully running generally through the lands leased by Mr. Aiken?

A. That is on this big ridge to the north here; I don't have occasion to go; I have occasion to go down this way to my own land.

Q. You are referring to a portion of the land east? A. North.

Q. You have never seen any water washing into rock gully because there is a ridge there?

A. Yes.

Q. Where does most of the washing occur?

A. This way on this side.

Q. You are pointing in a southeasterly direction? A. That is right.

Q. Are you acquainted with a portion of the

(Testimony of Clarence Parlemee.)

land in the Indian Reservation which is designated as a dry land area or is there any such designation known to you? A. No, there isn't.

Q. Your farming operations consist of all dry land farming, is that correct?

A. That is right.

Q. In the dry land farming method how do you strip farm or block farm?

A. Strip entirely. [177]

Q. And that is in the area involved also in this case, is it not? A. That is right.

Q. There is no block farming I believe you testified? A. No.

Mr. Wuerthner: That is all.

Cross Examination

Q. (By Mr. Cyr): Mr. *Cyr*, where is your land located with reference to section 30 and section 29, I will hand you Plaintiff's Exhibit 1, would you indicate on there what section this land was in? You are in section 36. Now you see the red mark which appears going through section — is your land through this black area?

A. I have it on both sides of the creek.

Q. Just south of section 30? A. Yes.

Q. Are you in the Blackfeet Irrigation Project?

A. Yes.

Q. All of it or part of it?

A. Part of it, part of the acres, the creek, Birch creek is the reservation line; I have land on both sides of it.

(Testimony of Clarence Parlemee.)

Q. And Birch Creek is the black area on [178] Plaintiff's Exhibit 1 which appears in the section which is south of section 30, is that right?

A. I didn't follow you.

Q. This black area that is where your land is, is it?

A. That is commencing a gully; yes, I run over here; that is just gullys and creeks.

Q. So the area which you have next to section 30 is all gullys or creek beds or something of that kind?

A. No, no, not all of it.

Q. Has any of that *be* determined, any of your land within the Blackfeet Irrigation Project determined to be irrigable?

A. No.

Q. None of it has been determined to be irrigable?

A. No.

Q. And you have never been assessed any O & M charges as a result of that on that land?

A. No, not that I know of.

Q. Have you leased some other lands in the Blackfeet Irrigation Project?

A. Yes.

Q. Do you have to pay O & M charges?

A. At one time.

Q. On those which were designated as irrigable of that leased land? [179]

A. That is right.

Q. And everybody in the project has to do the same thing, do they not?

A. I can't answer that.

Q. How long has it been since you leased in there Mr. Parlemee?

A. Oh, about 8 or 10 years.

(Testimony of Clarence Parlemee.)

Q. And at the time you had leased in there were you using water for irrigation?

A. No, we didn't use it.

Q. On the leased land? A. No.

Q. But you had to pay your O & M charges anyway? A. Yes.

Mr. Cyr: That is all.

Redirect Examination

Q. (By Mr. Wuerthner): The O & M charges that you paid were provided for in your lease, were they not? A. Yes, sir.

Q. How long ago would you say that was?

A. About 8 years ago, I believe, or 10. I just can't remember. [180]

Q. Now was the land you paid O & M charges on located close to the land in question here or where was it located with reference to Mr. Aiken's former land?

A. About half a mile south and a little bit west.

Mr. Wuerthner: That is all.

Mr. Cyr: No further questions.

LLOYD CAMPBELL

was called by the defense and having been duly sworn testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Will you please state your name? A. Lloyd Campbell.

Q. Where do you reside?

(Testimony of Lloyd Campbell.)

A. I get my mail at Williams, Montana, that is 6 miles east of Valier where I live.

Q. You live approximately 6 miles east of Valier? A. Yes.

Q. And you are here in response to a subpoena?

A. That is right.

Q. How long have you lived 6 miles east of Valier? A. I came to Montana in '15.

Q. And resided up there?

A. Been there ever since. [181]

Q. Are you acquainted with the defendant?

A. Yes, I am.

Q. How long have you known him?

A. Well all his life I guess about.

Q. You have known the defendant then as long as you have been up in that vicinity then?

A. Yes.

Q. What is your occupation?

A. I am a farmer.

Q. How long have you farmed?

A. Since '15 here in Montana.

Q. Up to date?

A. Up to date and still farming.

Q. Where is your farm located?

A. 6 miles east of Valier.

Q. East of Valier? A. Yes.

Q. Where is it located with reference to the land previously leased by Mr. Aiken involved in this action?

A. I guess it is about 15 miles south and east.

(Testimony of Lloyd Campbell.)

Q. Is your land a part of the irrigation project?

A. My land is part of the Valier Irrigation Project; that is a different irrigation project than the land that Aiken was involved in.

Q. Is your land, does it border on the [182] Blackfeet Irrigation Project?

A. The Blackfeet Irrigation Project is north and west of Valier, just across Birch Creek, while I live east of Valier so I am 14 to 15 miles from the Blackfeet Indian Project, Reservation.

Q. Are you acquainted with the character of the land involved in this action? A. Yes.

Q. Have you been over this land?

A. I have but several years ago.

Q. How long has it been since you have looked at this land?

A. Well, I don't know exactly but probably 12, 14 years.

Q. You have looked over this land during the time Mr. Aiken had his leases, did you not?

A. I have been in that vicinity several times.

Q. Did you actually physically go over this land, land of his?

A. I don't remember I was over that same place but I have been near it several times.

Q. Do you know or are you acquainted with the system of irrigation canals which exists in or on the land leased by Mr. Aiken?

A. I am not too well acquainted with the ditches right in that area or what shape they may be in.

(Testimony of Lloyd Campbell.)

Q. Did you know at the time you went over here over this land what condition these ditches were in?

A. Well that was quite a few years ago but I don't remember of any certain ditch; I couldn't tell you much about the ditches.

Q. What have you to say with reference to the leased land involved in this action as compared with the land which you are farming?

Mr. Cyr: To which we object.

Mr. Wuerthner: Just a minute, let me finish my question.

Q. Would you say, if you know, whether your land is similar or not to the land leased by Mr. Aiken.

Mr. Cyr: To which we object, there is no proper foundation laid. This man testified his land is 15 miles away and on a different project and he hasn't been there in recent years and he didn't go on the land and hasn't been in the vicinity of it.

The Court: Sustain the objection unless you establish a foundation.

Mr. Wuerthner: I will further qualify him.

Q. Did you occupy any official position at Valier?

A. No, not in Valier. I don't know what you mean.

Q. Did you have any connection with the allotment program?

A. That is a County program and I am chair-

(Testimony of Lloyd Campbell.)

man of our [184] Pondera County allotment or A.S.C. as we call it.

Q. Do you know whether or not the lands leased by Mr. Aiken are in Pondera County?

A. Yes, they are in Pondera County.

Q. How long have you had this position?

A. Well, I have been one of the committeemen for about 14 years, I think I have just been chairman for two years.

Q. But you have been on the committee for 14 years? A. Yes.

Q. Now as a part of your duties in connection with this job were you required to go out and look over various parcels of land?

A. As a committeeman unless there was something special we weren't required to go check each piece of land although the county committee hires help to check wheat acres and other practices, conservation practices I should say.

Q. Did you ever check wheat acres on this land leased by Mr. Aiken? A. Not personally.

Q. You never were personally on his land?

A. I never check wheat acres personally on this piece of land but we have hired men to do that job.

Q. Did you state that you were personally on this land approximately 12 years ago?

A. I have been on that land at different times, and one [185] reason I use to have a sister who lived right near it and we visited there a lot of times and we would drive around through their different crops.

(Testimony of Lloyd Campbell.)

Q. Did you ever look at Mr. Aiken's crops?

A. No, I don't remember ever being there when Mr. Aiken was farming it.

Q. Do you know what type farming Mr. Aiken followed?

A. Most of his farming is strip farming.

Q. Is that based on your observation of his land?

A. What I see of the record in our allotment program his farm, this farm in particular in our records shows that it is stripped.

Q. What records are you referring to?

A. The county A.S.C. Agricultural Stabilization Conservation.

Q. And did you examine those records prior to coming down to testify in this action?

A. I have.

Q. And your testimony now is based upon your examination of those official records?

A. Yes, in our farm program.

Mr. Cyr: We will object to the witness volunteering anything, your Honor.

Mr. Wuertner: I think this is in answer to the question I asked. [186]

Mr. Cyr: I think this question was answered. It appears to me the witness is not qualified to testify. Now if he is going to testify from records, we object on the grounds it is not the best evidence, the records themselves would be the best evidence. He has never been on the land and does not know anything about it; the witness is per-

(Testimony of Lloyd Campbell.)

fectly honest and does not know anything about these lands.

Mr. Wuerthner: Well I better put a question to him and we will see.

Q. Now, Mr. Campbell, did you testify that you have been chairman of the allotment committee for the last two years?

A. This is the second year.

Q. And in your capacity as chairman of the allotment committee did you have official access to the records of the committee? A. That is right.

Q. And are the records kept under your direction and supervision? A. That is right.

Q. And you testified that you had occasion to examine the official records of the committee?

A. Yes.

Q. And where are those records kept and maintained?

A. They are kept in the courthouse. [187]

Q. What county?

A. Pondera County at the A.S.C. office.

Q. Now I am handing you defendant's proposed Exhibits 12 and 13 and ask you if you can identify those? A. Yes, I have looked at these.

Q. Will you identify them?

A. That is what we have in our record.

Q. Now are you referring to both exhibits 12 and 13, are you not?

A. This one is 12 and that is the one that has the land that is in question.

Q. In other words, all of the land shown on

(Testimony of Lloyd Campbell.)

Exhibit 12 is involved in this action? A. Yes.

Q. What about Exhibit 13?

A. Here just a part of this.

Q. A portion of 13 is involved in this action also? A. That is right.

Q. Who made up that exhibit?

A. This was made in our A.S.C. office off from an aerial map or aerial photo I should say that was taken in 51.

Q. Is that aerial photo which you testified to an official record in that office? A. It is.

Q. And that photo is on file in that office? [188]

A. It is.

Q. And what file number does it bear?

A. The photo number is 7 H 186.

Q. And both exhibits were prepared from that aerial photo, were they not?

A. And this exhibit 13 aerial photo No. is 7 H 170.

Q. I note that Exhibit 12 contains two pages, is the second page a copy of the first page on that exhibit?

A. These were both made from the aerial photos.

Q. From the same aerial photo?

A. In the field last summer in check wheat acres they got this one mixed up so there was a new map, otherwise they are the same, the top page is a new map prepared from the other copy.

Q. The top page is a new map prepared from the other copy? A. That is right.

Q. Now who prepared these exhibits?

(Testimony of Lloyd Campbell.)

A. The girls that work in the office.

Q. Were they prepared under your direction and supervision? A. That is right.

Q. And they were prepared at your instance?

A. That is right.

Q. And are they or do they truly portray as a copy the [189] official records in the office of the acreage program? A. That is right.

Q. And that is a correct portrayal then of the original records? A. Yes, it is.

Mr. Wuerthner: We offer into evidence defendant's proposed Exhibits 12 and 13.

Q. (By Mr. Cyr): When were these records made, Mr. Campbell?

A. They have been made, that new one was made since last summer.

Q. Which do you mean, new one, 13 or 12?

Mr. Wuerthner: Show them to him so he can clearly identify them.

A. This top one here was made since the fieldman was out last summer and mixed this one up.

Q. You are referring to Exhibit 12?

A. Yes, I don't know the time these were made but they have been made within the last year and a half.

Q. Each of these have been made within the last year and a half?

A. They were working on the maps and if there is any change in a farm they make a new map for it.

(Testimony of Lloyd Campbell.)

Q. These don't reflect what was done from 44 to 49 on the lands here described? [190]

A. This was made from the aerial photo in 51 as the fields were at that time.

Q. As the fields were in 51? A. Yes.

Q. Do you know who the, it says here the operator was Henneman at that time?

A. It is now.

Q. And he still is?

A. He is the operator now on our records.

Mr. Cyr: We object, your Honor.

Mr. Wuerthner: May I ask two or three questions in regard to this before you make your objection?

Q. Referring again to Defendant's proposed Exhibits 12 and 13, tell us if you know of your own knowledge whether or not the conditions portrayed herein are the same as existed from 44 to 49?

Mr. Cyr: To which we object, your Honor, on the grounds there has been no proper foundation for the question the witness testified he is not familiar with the lands in question.

The Court: I will sustain the objection.

Q. (By Mr. Wuerthner): You state you were last on the land involved in these exhibits 12 years ago approximately? A. Yes. [191]

Q. That would be approximately 42?

A. Yes, along in that time.

Q. And you have not been personally on these lands since that time?

A. No, I can't recall that I have.

(Testimony of Lloyd Campbell.)

Q. Do you know whether or not there have been any changes in the lands from the last time that you were on the land and as shown by these exhibits?

Mr. Cyr: To which we will object on the grounds the witness testified he had no independent recollection of ever being on this land, that he was in the area.

The Court: Sustain the objection.

Mr. Wuerthner: Your Honor, we are now offering these documents under the official document rule and we believe we have laid the foundation now for admission into evidence under that rule.

Mr. Cyr: Our objection is not to the identification of them or to the fact this man would be personally introducing them into evidence, if they are relevant, but they have no materiality to the matters in issue in this case; they were made for the records and the originals of which were long after and the witness testified the condition of the soil changed during that time; our objection is as to the materiality of the exhibits.

The Court: I can't see how they will be material now [192] in view of the testimony given by this witness.

Mr. Wuerthner: Your Honor, I believe we can tie the materiality in by another witness on these exhibits.

The Court: Very well then you may attempt it if you can.

Mr. Wuerthner: Mr. Henneman.

HENRY L. HENNEMAN

resumed the stand and testified as follows:

Redirect Examination—(Continued)

Q. (By Mr. Wuerthner): I am handing you defendant's proposed Exhibits 12 and 13 and ask you if you can identify them? A. Yes, I can.

Q. Did you ever receive copies of these exhibits?

A. I have copies exactly like that.

Q. And when did you receive these copies?

A. Early last spring, a copy of both of them.

Q. A copy of both of the exhibits?

A. Yes.

Q. Now do you know what those exhibits purport to represent?

A. They show who has been on the farm and the acres for each strip, that is so each farmer can figure the allotment wheat acres he is to seed.

Q. Now, Mr. Campbell has testified these exhibits were [193] prepared or based on an aerial photo taken in 51, now I will ask you whether or not that represents the condition of the land at the time you took this lease in 51 and also the time you took your lease in 49 on a portion of the lands occupied by Mr. Aiken prior to you?

Mr. Cyr: To which we object on the ground no foundation laid; it hasn't been shown this witness ever saw the aerial photograph from which these records were prepared.

Mr. Wuerthner: Your Honor, we already have testimony in this is an accurate portrayal from the aerial photograph.

(Testimony of Henry L. Henneman.)

The Court: Yes, and also at the direction of the committee. Let him answer the question.

A. I didn't quite understand your question.

Mr. Wuerthner: Read the question.

(Question read.)

A. Yes, it does.

Q. In other words, at the time you took possession of the lands involved in these two exhibits there was no change from the exhibit as shown here, is that correct? A. That is correct.

Mr. Wuerthner: Now may it please the court, I would like to further identify these by calling Mr. Aiken for the limited purpose only of further identifying this exhibit. [194]

The Court: Very well.

ROBERT AIKEN

defendant, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Will you please state your name? A. Robert Aiken.

Q. You are the defendant in this action?

A. Yes, sir.

Q. And you have previously leased the land involved in this action? A. Yes, sir.

Q. Handing you defendant's proposed Exhibits 12 and 13 I will ask you if you can identify those?

A. I identify 12.

Q. Will you identify 12? A. Yes.

Q. What is it?

(Testimony of Robert Aiken.)

A. It is a portion of the land I had leased on the reservation.

Q. It is a portion of the land? A. Yes.

Q. Do you know about what portion that represents? A. There are six 40's missing. [195]

Q. In other words, that portion of the land you rented previously except 240 acres? A. Yes.

Q. Now with reference to Exhibit 12 will you examine it and tell the court whether or not that portrays the land the same as when you occupied it? A. Yes, sir, it does.

Q. Has there been any change in the land since you occupied it as shown by that exhibit?

A. No, sir.

Q. It is exactly the same? A. Yes, sir.

Mr. Wuerthner: Do you have any examination?

Mr. Cyr: Yes.

Cross Examination

Q. (By Mr. Cyr): Have you ever seen Plaintiff's Exhibits 12 and 13 before? A. No, sir.

Q. You have never seen it before? A. No.

Q. How do you know what they are, Mr. Aiken?

A. Because I recognize the lay of the land and the [196] maps made out that they sent me at the time I farmed it.

Q. At the time you farmed it, Mr. Aiken, did you have those?

A. That isn't my—I said 12.

Q. 12? A. I have that.

Q. Do you have that yet?

(Testimony of Robert Aiken.)

A. No, I do not have it now.

Q. And when you say that the land is the same what do you mean by that answer?

A. It is stripped out.

Q. You mean you strip farmed it also?

A. Yes, sir.

Q. And it is being strip farmed now?

A. Yes.

Q. You can't tell anything else from the exhibit? A. No, sir.

Q. You think then the fact it is stripped farmed? A. It is stripped.

Q. Referring again to Exhibit 12 does this represent then the manner of farming during the entire time that you occupied the land there shown?

A. What is that now?

Q. Does this show the method of strip farming as you say during the entire time you occupied that land? [197] A. Yes, sir.

Mr. Wuerthner: We now offer into evidence defendant's proposed Exhibits 12 and 13 first under the official business records rule and with regard to Exhibit 12 for the purpose of showing the method of farming.

Mr. Cyr: To which we object on the ground it is not material and the objection is formal because it does not make any difference whether he strip farmed or anything else, it hasn't anything to do with the materiality of this case, even admitting the fact he stripped farmed it he would owe the O & M charges.

Mr. Wuerthner: May I answer that briefly there is in evidence here farming and grazing leases.

The Court: To save time I will admit it subject to objection and you can explain it later on and then I will see what I will do with it.

Mr. Wuerthner: Will you please take the stand again, Mr. Campbell?

LLOYD CAMPBELL

resumed the stand:

Direct Examination—(Continued)

Q. (By Mr. Wuerthner): Now, Mr. Campbell, referring you again to Defendant's Exhibits 12 and 13, I will ask you now what they show?

A. Well they show the operator's name as it is now, [198] and the owner, Indian Agency description of the land, and it shows the method of farming on this land over in this one corner.

Q. You are referring to the upper lefthand corner of Exhibit 12?

A. Is a little area marked with an X that means that corner is soded, evidently a gully or something in there that can't be plowed out.

Q. Now there are also appearing at the top of this graph some figures, will you explain what they represent?

A. That is the acres in each one of the strips, for instances, the first one on the left side is 11.7, the next 12.3. Now had there been a ditch through here or a gully it would have showed a mark through as it does on this one up here.

(Testimony of Lloyd Campbell.)

Q. You are referring to Exhibit 13?

A. Yes.

Q. And there is a small square at the top of the exhibit and you see that at the top of the square a ditch is shown?

A. It shows a ditch or gully again and then shows on this one where there have been new strips established as of the last year.

Q. Now what is the purpose of those amounts or acreages?

A. Those are for the benefit of the farmer, the operator, and also for our use in the allotment program; if you notice [199] this first strip it says durum.

Q. Exhibit 12?

A. That means in 55 it was durum wheat fields, the next summer fallow and the next one durum and so on until we get to strip No. 15 where it is spring wheat.

Q. Mr. Campbell, I believe you previously testified you have farmed in the general vicinity of this land for the last 40 years? A. Yes.

Q. Are you acquainted with the method of farming in that vicinity? A. Yes.

Q. Would you tell the court the method you employed, whether or not it is strip or block farming?

A. There are changes going on all the time and in the period spoken about a little while ago here, 30's when we had a lot of soil erosion from the field block summer fallow the method was changed

(Testimony of Lloyd Campbell.)

from block farming over into strip farming and that applied on irrigated land or dry land, either one.

Q. Is that land in that general vicinity dry land or irrigable land?

Mr. Cyr: To which we will object on the grounds this witness is not qualified to answer the question, he has never been on the land and he testified he hasn't seen [200] the crops growing on the land when Aiken was there and he doesn't know whether it was irrigated or not.

The Court: I think you will have to add some additional qualification to permit that answer to be made.

Q. Mr. Campbell, have you ever had occasion to irrigate any of this land?

A. In the 40 years I have farmed I expect there's never been a year but what I have irrigated some.

Q. That you haven't irrigated some?

A. Some land.

Q. What type of land did you irrigate?

A. Well my irrigated land is more on the level and it is not as much rolling land, and the last few years, well, we will say the last 10 or 12 years I have irrigated very little grain, it is mostly alfalfa, hay and pasture.

Q. Do you strip farm in the area that you irrigate?

A. Ours is strip farming, is all narrow strips as these in the picture and I irrigate very little grain.

The Court: I don't see the materiality of this witness putting in a lot of time here that I am afraid won't have much attention later on.

Mr. Wuerthner: That is all we have.

Mr. Cyr: No questions. [201]

ROBERT AIKEN

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Robert Aiken? A. Yes, sir.

Q. And you have previously testified in this case? A. Yes, sir.

Q. And you are married? A. Yes, sir.

Q. You have a family? A. Yes.

Q. What does it consist of?

A. A girl and a boy.

Q. Where do you reside? A. Valier.

Q. How long have you lived there?

A. I lived right in Valier about 10 years. I lived out of Valier all the rest of my life, about six miles.

Q. How long have you resided in Pondera County? A. All my life.

Q. What is your occupation?

A. Farming and ranching.

Q. How long have you been engaged in farming? A. Ever since I was about 18. [202]

Q. Can you give us approximately how many years that would be?

A. I was raised on a farm and I farmed for myself the last 23 years.

(Testimony of Robert Aiken.)

Q. Calling your attention to Plaintiff's Exhibit 1 I will ask you if you know what that portrays?

A. Yes, it is the land that I had leased and the ditches.

Q. Now does the same portions accurately represent the land which you leased from the Government?

A. Yes, sir.

Q. And do the ditches as shown there accurately portray the conditions as they existed during the time you held your leases?

A. Well, no, No. 3 here was not there until about '48.

Q. You refer to the ditch terminating at?

A. 3.

Q. Now will you restate that on the basis of the exhibit?

A. No. 3, there was no ditch in there when I first had the land until about '48.

Q. You are referring to blue 3? A. Blue 3.

Q. And the ditch running off the main ditch there, was it there?

A. This ditch here there was just a mark down through.

Q. Red 3 to red 4? [203]

A. At that time we drove across there about in here.

Q. Did you lease this land prior to '44?

A. Yes, sir.

Q. And which land did you lease?

A. Well I had all of this in here except——

Q. Now you are pointing there to the——

(Testimony of Robert Aiken.)

A. North half of 30 and north half of southeast quarter of 30 and the northeast quarter of the southwest quarter of 30.

Q. In other words, did you lease the land previously shown in green? A. Yes.

Q. All of it?

A. Not all of it, these two 40's.

Q. You are referring to——

A. Lot 1 in section 25 and northeast quarter of the northwest quarter of section 25.

Q. And did you lease the land shown in section 26? A. Yes, no, not at that time.

Q. When did you first come on that land?

A. In about '39.

Q. Did you go on the land pursuant to a lease?

A. No, Mr. Cross, the lease clerk at Browning, at that time I was looking for some land and he come down and told me that he would take me up and show me this land and there was a lot of it had blown and big sand piles on it and he said [204] if I would take the strip there, he would give me a lease on it and he said if I wanted water, I could pay for it in advance and get it.

Q. Who was Mr. Cross?

A. He was the lease clerk in Browning.

Q. Is he the lease clerk up there at the present time? A. No, he is not.

Q. Now the period 39 to 44 did you use any water on the lands that you have testified to?

A. 39 to 44 there was two 40's I had water on.

Q. Where were those 40's on?

(Testimony of Robert Aiken.)

A. Lot 1 in section 25 and the northwest quarter of the northwest quarter of section 25, I broke it out.

Q. What do you mean?

A. It was in sod and I broke it out and watered them the first two years.

Q. Will you tell the court why you irrigated those first two 40's?

A. I cropped it to flax the first year and the second year I put in wheat and tried to irrigate it again to bring it through and the sod won't produce very much, it don't hold the moisture and after that I stripped it out.

Q. Is sod more susceptible to irrigation than other types of land?

A. Yes, it is clotty and will hold the water.

Q. It will hold the water better?

A. It will not wash.

Q. Now, Mr. Aiken, how do you classify the land involved in this action which you formerly leased?

A. I would classify it as dryland.

Q. And why do you classify it that way?

A. Because it is too rolling to irrigate and too light to do anything but strip it out and it will not blow away.

Q. When you entered into the 44 lease, was it pursuant to a notice?

A. They sent out a notice of the bid for farming and grazing leases.

(Testimony of Robert Aiken.)

Q. And you read the notice and then submitted your bid? A. Yes, sir.

Q. Did the notice anywhere specify whether or not the land was irrigable or not?

A. No, sir, it did not.

Q. No mention was made? A. No.

Q. And how had you farmed the land for the previous five years before you entered into the 44 lease? A. Farmed it as dryland.

Q. How has that land been farmed since your lease, if you know?

A. It is still stripped out and farmed as dry.

Q. Now, Mr. Aiken, do you know when the first demand for water rental was made upon you?

A. Around '50.

Q. Was that after the termination of the '44 lease? A. Yes, it was.

Q. Do you know whether or not this land involved could be farmed by irrigation?

A. It could be but it is not practicable.

Q. Impracticable? A. Yes.

Q. Could the land involved be irrigated by means of ditches in the area?

A. No, it could not.

Q. Why not?

A. Because they aren't large enough, there is only about ten days out of a year that you can irrigate grain and give any advantage to it and there isn't ditch enough to handle enough water to irrigate that much.

Q. Is the land susceptible of irrigation?

(Testimony of Robert Aiken.)

A. No.

Q. Why not?

A. It is kind of flaky soil and washes very bad.

Q. The soil washes? A. Yes.

Q. Would you say from the irrigation system of ditches [207] as shown on the map that water could be brought to the land?

A. It could be brought there but not sufficient quantities enough to irrigate with.

Q. Now with regard to the designation of the irrigation project where the lands leased by you correctly designated as the Blackfeet Indian Irrigation Project? A. Yes.

Q. What have you to say with regard to the Badger-Fisher Irrigation Project?

A. That is a project that is a portion of the Blackfeet Indian Reservation.

Q. Was that portion of which you leased?

A. I am on the east end of it on the Badger-Fisher Irrigation Project.

Q. Now at the time you entered into the '44 lease who did you negotiate that lease with?

A. I made a bid out, you mean previous to '44?

Q. No, on the '44 lease?

A. On the '44 lease I made out a bid and sent it in to the Superintendent of the Blackfeet Indian Reservation and marked lease bid on it.

Q. Can you state whether or not at that time any mention was made of the irrigable land?

A. There was not.

(Testimony of Robert Aiken.)

Q. What was your understanding at that time as to the [208] type of land?

A. I figured it was dryland.

Q. And what was that based upon?

A. They sent me the lease and told me to get my two bondsmen and sign up with the first year's rental sent back to them and they would approve the lease and they made no demand for any water.

Q. How did you previously farm?

A. I farmed the dry stripped out.

Q. At the time you executed the '44 lease was any demand made upon you for water rentals?

A. No.

Q. And there had been no demand until as you testified in '50? A. Yes.

Q. Do you know how the land was allotted to you under the '44 lease?

A. To place a bid on it.

Q. I am referring to acreage? A. No.

Q. How many acres in a tract usually?

A. There's 320 on one allotment and 80 on another allotment and seven 40's on another allotment and they are all each separate allotments.

Q. What relationship is there between the allotment, [209] the allotted tract and the irrigability of the tract?

A. Well I always understood that whenever they issued 80, 100 or 320 it was considered as dryland and the irrigated acreage was allotted out in 40's.

Q. The irrigated acreages were allotted in 40's?

(Testimony of Robert Aiken.)

A. Yes.

Q. Mr. Aiken, I will ask you whether or not there are any rentals due under the two leases in question here? A. There is not.

Q. You have paid the rentals for the land in full? A. Yes, sir.

Q. Do you pay those rentals annually?

A. Yes, sir.

Q. At the time of the annual rentals payment was anything demanded in relation to water charges?

A. No, sir, there was not.

Q. Did you ever demand any water?

A. Not on this lease.

Q. Not under the two leases?

A. Not under the two leases.

Q. Did the Superintendent or the party in charge of the water offer to supply you water at any time during these leases?

A. Not during these leases.

Q. Do you recall during that period seeing any water in [210] the ditches?

A. Just at the end of the two major ditches is all.

Q. And how far would that be from your land?

A. Practically a mile on some, on one 40 the west side was right in it.

Q. I didn't get you.

A. They dumped the west side into the rocky coulee on one 40 of mine.

Q. Mr. Aiken, at any time during these leases

(Testimony of Robert Aiken.)

did you discuss the matter of farming with any of the officials of the Blackfeet Indian Project?

A. No, sir, I did not.

Q. And none of them ever called you, contacted you on it? A. No, sir.

Q. I am handing you Defendant's proposed Exhibit 6 and ask you if you can identify it?

A. Yes.

Q. Do you identify it?

A. Notice of sale of leases.

Q. Did you receive that? A. Yes, sir, I did.

Q. And did you put in any bid pursuant to that?

A. Not on this.

Q. Had your lease expired at the time you received that?

A. One of them had, the big lease had expired in '49. [211]

Mr. Wuerthner: We offer in evidence Defendant's Exhibit 6.

Mr. Wuerthner: I might ask you do you know who sent that lease out?

A. Sent out by the Browning Indian Agency.

Mr. Cyr: Your Honor, we will object to this on the grounds it is immaterial, and before I make the objection——

Q. (By Mr. Cyr): Did you lease the lands in '49? A. I had one lease running.

Q. You had received this same thing for '46?

A. Yes, I got one each year.

Q. Do you have the other you received in '46?

A. No, I haven't.

(Testimony of Robert Aiken.)

Q. And you didn't lease any land at all pursuant to Defendant's Exhibit No. 6? A. No.

Q. You just picked that up some time after these leases in question?

A. It was mailed to me. I just wanted to have that on hand.

Mr. Cyr: We object on the grounds it is not material to any issue in this case. We can, if counsel wishes, furnish the lease of '46 which was used.

Mr. Wuerthner: We are going to offer that in [212] evidence, your Honor, and I believe we can tie the materiality in.

The Court: It does not seem to be material now. It appears to be a notice of which he didn't take advantage; he never leased any lands under that lease; it wasn't pursuant to any lease that refers to.

Mr. Wuerthner: We would like the court's permission to tie this in with the lease specified in the complaint.

The Court: Well if you can—if you can show the materiality, that is a different thing. It is admitted subject to that. How many witnesses have you got there?

Mr. Wuerthner: This is my last witness.

The Court: Do you have some rebuttal?

Mr. Cyr: I don't think we have unless something appears from here on. We haven't anything presently in mind.

(Testimony of Robert Aiken.)

The Court: Well do you want to continue on and finish?

Mr. Cyr: Yes, your Honor, we would like to.

The Court: Very well, you may proceed under those circumstances.

Q. (By Mr. Wuerthner): Mr. Aiken, calling your attention to the latter portion of Defendant's Exhibit 6 I will ask you what appears thereon?

A. It shows allotment number and the allottee and description of the land and section, township and range, and also shows the irrigated acres, the dry acres and grazing [213] acres.

Q. And this notice was in '49, was it not?

A. Yes.

Q. Did the notice which you received and which solicited this '44 bid contain any breakdown of irrigated acres and dryland acres?

A. It did not.

Q. Do you know whether any notices you received subsequent to '44 contained that breakdown?

A. Not before '44.

Q. Did you receive any since that time or after that time that contained a breakdown of the irrigated and dryland acreages?

A. I received one practically every year but this is the only one I appear to have on hand at the time.

Q. And the '44 bid notice which you received contained no records to which acreages were farming and which were grazing?

A. They did not.

(Testimony of Robert Aiken.)

Q. What happened, appeared prior to that time, what about the breakdown between irrigated and dry acres?

A. The only thing it showed was farming acres and grazing acres in each allotment.

Q. Mr. Aiken, to clear up a discrepancy here, I believe you testified that no mention was made in the '44 sale of [214] farming and grazing leases? On the breakdown between farming and grazing I will call your attention to Exhibit 6 and ask you if there is a breakdown of the acres for farming and grazing?

A. There is for farming and grazing.

Q. But the farming acres were not broken down between irrigated and dryland? A. No.

Mr. Wuerthner: That is all we have.

Cross Examination

Q. (By Mr. Cyr): Mr. Aiken, did you have an opportunity to read the answer in this case before it was filed, do you recall? A. Yes, sir.

Q. Did you read that before it was filed?

A. Yes, sir.

Q. And in that you alleged no demand was made upon you prior to the time the action was filed in this case, do you recall that? And I am not trying to trick you. Mr. Aiken, do you recall that? A. I recall that.

Q. And now you say that actually a demand was made on you in '50, is that right?

(Testimony of Robert Aiken.)

A. They sent a slip that there was O & M charges due. [215]

Q. Did you represent to the court that no demand was made upon you prior to '50 for the payment of this money?

A. No, there was nothing prior to '50.

Q. There was nothing prior to that?

A. No, never received any.

Q. Now as a matter of fact prior to February 8, 1949, you conferred with your attorneys, Murch and Wuerthner, with reference to this matter, did you not? I will hand you what has been marked as Plaintiff's Exhibit 10 and refer you to the letter dated February 8, 1949, would you read that, please? Isn't that true?

A. That is a letter written by Murch and Wuerthner to the Superintendent.

Q. And what in reference to?

A. With reference to O & M charges on lease.

Q. And so you had talked to your attorneys prior to February 8, 1949?

A. I possibly had according to this but that account was dated '50 which has been offered in evidence.

Q. I am asking you now if it isn't true a demand was made on you in '48?

A. I don't think so.

Q. In the fall of '48?

A. Because when I got a letter from them up there they said that they would, if I didn't pay the O & M charges, they [216] would cancel the

(Testimony of Robert Aiken.)

lease and the big lease was already cancelled, it expired.

Q. From that letter does it refresh your memory when you first talked with your attorneys?

A. It would be around in there.

Q. You talked with them before they wrote that letter?

A. I talked to them the same time they wrote this or I wrote it.

Q. So you had notice at that time or some time prior to February 8, 1949, that you were to pay the O & M charges?

A. It could have been a few days there.

Q. So the answer is incorrect and your previous answer it was '50 are both wrong, are they not; it was on the 8th of February, 1949 or prior to that time?

A. It could be.

Mr. Wuerthner: At this time, your Honor, we move to amend our answer to conform to the proof; I am not sure whether federal rules permit that.

Mr. Cyr: I think as a matter of law if that is counsel's desire, the pleadings are amended to conform to the proof and under the circumstances we have no objection to it.

Q. When did you first go on to any of this land shown in Exhibit 1?

A. Well in '39 I got the first notice. [217] I was up there in the winter of 38 and spring of 39.

Q. And that was by virtue of the assignment of lease from Mr. Wickware, was it not?

A. No, sir.

(Testimony of Robert Aiken.)

Q. You did obtain an assignment of some property from Mr. Wickware, did you not?

A. I could have. I don't think it was from Mr. Wickware; it might have been Mr. Clarence Kuka.

Q. Or a portion of it? I will hand you what has been marked Plaintiff's Exhibit 14 and ask you if you recognize the signature on that?

A. Yes, sir.

Q. You do? A. Yes, sir.

Q. And what is that, sir?

A. It is a lease form, assignment of lease from Mr. Wickware.

Q. And when was that dated?

A. Its beginning in 40 the first two allotments, 41 and 42, and 40-41.

Q. What lease number was assigned?

A. Lease No. D 247?

Q. Now you accept the assignment and provisions of the lease and agreed to make payments thereunder, did you not? A. Yes, sir. [218]

Q. I will hand you what has been marked as Plaintiff's Exhibit 15 and refer you to the lease No. F G 247, that is the lease for which you accepted the assignment, was it not? A. Yes.

Q. And does that not cover some of the lands which are here involved?

A. Yes.

Q. Would you indicate on page 1 which lands are included within those exhibits?

Mr. Wuerthner: Your Honor, we are going to object to any testimony from these exhibits until

(Testimony of Robert Aiken.)

we have had a chance to examine the witness and see whether or not they are pertinent.

Mr. Cyr: We are just making the materiality foundation at this time identifying the exhibits.

Q. Did you identify the lands involved with relation to Exhibit 1?

A. The northeast northwest section 25.

Q. Is that part of the lands?

A. Northeast northwest.

Q. You are taking a portion of the land in section 25 on Plaintiff's Exhibit 1?

A. Yes, northeast southwest of section 30.

Q. Northeast of the southwest?

A. Of 30. [219]

Q. That is a portion of the lands which are covered in green on this Exhibit 1?

A. Yes, Lot 1 in section 25.

Q. And that is the portion marked in green on Plaintiff's Exhibit 1? A. Yes.

Q. So all of the lands which are described in that lease are a part of the lands covered in green on Plaintiff's Exhibit 1? A. Yes.

Q. Now you had occasion to see that lease prior to the time you accepted the assignment of it, did you not? A. I suppose I did.

Q. And you accepted the assignment of the lease after studying the provisions of that lease?

A. Yes.

Mr. Cyr: We offer in evidence Plaintiff's Exhibits 14 and 15.

(Testimony of Robert Aiken.)

Mr. Julius Wuerthner: Your Honor, I believe we could save a little time if we had a recess, there's some matters here that have just come to our attention that I think we have overlooked. I think it would be for the interests of justice if we could have a short recess.

Mr. Cyr: After they are finished, your Honor, and if they had any other witnesses, maybe they could call them. [220]

The Court: You have nearly finished?

Mr. Wuerthner: Yes.

Mr. Cyr: With this witness and cross examination I have just a few more questions.

Mr. Wuerthner: I would like to have permission to question the witness on Plaintiff's Exhibits 14 and 15 if I may.

The Court: You want to question him on those exhibits?

Mr. Wuerthner: Yes, your Honor.

The Court: Very well.

Q. Mr. Aiken, referring to Plaintiff's Exhibits 14 and 15, I will ask you at the time you executed the assignment of Exhibit 14 whether or not that was attached or stapled in any way to Plaintiff's Exhibit 15? A. I don't think it was.

Q. Were those two documents together at the time you executed the assignment?

A. Well I don't say but I don't believe they were.

Q. Did you receive copies of Plaintiff's Exhibit 15 which is the lease to Wickware?

(Testimony of Robert Aiken.)

A. I think they sent me a copy after this was signed over.

Q. But you don't recall whether these two documents were attached together?

A. I don't think that there was.

Mr. Wuerthner: No objection. [221]

Q. (By Mr. Cyr): Now, Mr. Aiken, you have testified these here Plaintiff's Exhibits 14 and 15 were a part of the lands that were in green on Plaintiff's Exhibit 1? A. Yes.

Q. Now those are the lands that are included in what has been described as the '44 lease, are they not? A. Yes, sir.

Q. So at the time you leased the '44 lease through that form on that land at least was irrigation, did you not?

A. I had never been asked to pay for water on it and I stripped it off.

Q. Would you just answer the question. You knew, however, that it was irrigable, did you not?

A. I didn't know it was irrigable any more than you could order water and pay for it if you wanted it and if you didn't use it, you didn't pay for it.

Q. You read where it says lessee agrees to pay operation and maintenance and construction charges as to irrigation in accordance with the rules and regulations of the Secretary of the Interior during the life of this lease?

A. Yes.

Q. That was a part of the lease?

A. Yes, at the time you could order water and

(Testimony of Robert Aiken.)

pay for it in advance and if you didn't want it, you didn't have to pay for it. [222]

Q. But in any event you knew that land was subject to the irrigation?

A. I knew it could be irrigated.

Q. You knew it could be irrigated?

A. If you wanted to.

Q. And you knew the Blackfeet Irrigation—that was a part of the Blackfeet Irrigation Project, you knew that too?

A. I knew it was the Badger-Fisher Project.

Q. Yes, part of the Blackfeet Irrigation District, I should say?

A. And one part on that when I ordered water the Watermaster, True, at the time accepted my money and said, that is off the project and if I got water enough, I will deliver it to you and if I haven't I will have to give your money back.

Q. But in any event at the time you got the lease you knew this was part of the Badger Creek Project in the Blackfeet Irrigation, did you not?

A. I know it was near there; I didn't know whether it was on the project or not.

Q. You did know it was on it?

A. I did not know it was on the project; I don't know where the boundary of the project was. Mr. True stated part of that was off the project.

Q. You knew where the ditches were? [223]

A. I knew where the ditches were.

Q. And the ditches were on your property?

A. Yes.

(Testimony of Robert Aiken.)

Mr. Cyr: That is all.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Wuerthner): Mr. Aiken, I believe you testified on cross examination you knew in '40 that this land could be irrigated?

A. There was parts of it you could order water for and irrigate it.

Q. What part are you referring to, the part you acquired through this Wickware lease?

A. Yes.

Q. Why didn't you order water?

A. Well I did on two 40's of it when I broke it up and after that I stripped it out because it was subject to erosion and blowing.

Q. Was there any erosion on the land you broke up?

A. No, it was sodded; I broke it up.

Q. And after it had been broken for a while does erosion occur?

A. Yes. [224]

Q. And is it common practice in that area when you break up land to irrigate it for the first year or so?

A. Yes, if it is handy and it lays in shape so you can irrigate it, it helps it out.

Q. Did you break up any land that is involved in the instant action under any leases which you held?

A. Yes, I did.

Q. I am referring to the lease in '44 and lease in '46 did you break up any land under those leases?

A. In the lease in '46.

(Testimony of Robert Aiken.)

Q. And did you irrigate the land after you had broken it? A. No, I did not.

Q. Was that farm land? A. Yes.

Q. You seeded that to crop?

A. I seeded it to crop.

Q. And you strip farmed it? A. Yes.

Q. And it is your opinion on the lands covered by 44 and 46 leases were drylands? A. Yes.

Mr. Wuerthner: That is all.

Mr. Cyr: No further questions.

The Court: Very well, that is all, Mr. Aiken.

The Court: That concludes the case.

Mr. Julius Wuerthner: We rest, your Honor.

The Court: Any rebuttal?

Mr. Cyr: We have no rebuttal, your Honor.

The Court: You both move for judgment in accordance with the prayer of your pleadings?

Mr. Cyr: Yes, your Honor.

The Court: How long do you need for briefs, do you think?

Mr. Wuerthner: Your Honor, prior to that and for the record may I renew our motion to dismiss which we made at the close of the plaintiff's case?

The Court: Yes. Overruled.

Mr. Cyr: Would 40 days on a side be too long?

The Court: Well it depends upon your engagements, if you are so tied up you feel you should have that, I will give you 40 days. I don't know there is any immediate rush.

Mr. Wuerthner: We have no objection.

Mr. Cyr: It may be we will need some notice,

your Honor, that is the reason we are asking that. We may have to find out what the testimony was.

Mr. J. Wuerthner: And you are requesting 40 days?

The Court: 40 days after receipt of the transcript of testimony.

Mr. Julius Wuerthner: Your Honor, we don't need [226] that much time after receipt of the transcript.

Mr. Cyr: Then we wouldn't need only 20 days after receipt of the transcript.

Mr. Julius Wuerthner: That is satisfactory.

The Court: Very well, 20 days on a side and 10 days to reply if reply is necessary.

(Adjournment 12:25 P.M., January 19, 1956.)

[Endorsed]: Filed Nov. 18, 1957.

[Endorsed]: No. 15834. United States Court of Appeals for the Ninth Circuit. Robert Aiken, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: December 9, 1957.

Docketed: December 30, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15834

ROBERT AIKEN, et al., Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ADOPTION

Comes Now the above-named Appellant, by and through his Attorneys, Wuerthner & Wuerthner, and hereby adopts the Statement of Points, dated December 9th, 1957, and the Designation of the Transcript dated November 22nd, 1957, as previously filed herein.

Dated this 13th day of January, 1958.

WUERTHNER & WUERTHNER,
/s/ By JOHN P. WUERTHNER,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 15, 1958. Paul P.
O'Brien, Clerk.